

QUARTERLY REPORT
of the
ATTORNEY GENERAL
of
ALABAMA

For the Period:
From January 1, 1938
Through March 31, 1938
VOL. X

TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:

In accordance with an Act of the Legislature of Alabama found on page 1114 of the General Acts of Alabama, Regular Session, 1935, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This report covers all opinions rendered by the Attorney General from January 1, 1938 through March 1, 1938.

The Act referred to above requires that six copies of this Quarterly Report be sent to each of the Probate Judges in the State and the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, and the County Superintendent of Education.

The Office of the Attorney General is anxious to render prompt and efficient service to the State and county officials. If you have any suggestion to make regarding the improvement of the service, we should be glad to receive it. We welcome your criticism.

Very respectfully,
A. A. CARMICHAEL,
Attorney General.

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OPINIONS



January 3, 1938

Hon. D. E. Dunn, Administrator,
Alabama Alcoholic Beverage Control Board,
Montgomery, Alabama.

Alabama Beverage Control Act—Per diem to succeeding member on Beverage Control Board.

Member of Beverage Control Board, succeeding former member who had used up the maximum per diem for his official year, is entitled to per diem not to exceed \$1200.00 for his official services rendered during the official year of his predecessors.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your letter of October 14, 1937, which is as follows:

"Section 4 of the Alabama Beverage Control Act provides for the creation of the Beverage Control Board, consisting of three persons, who shall be appointed by the Governor, upon advice and consent of the Senate. It further provides that said members shall be paid their actual expenses while engaged in the performance of their duties, and a per diem of \$10.00 per day, and not exceeding \$1200.00 per annum. The Board members are appointed for a period of two years, four years and six years. Mr. W. O. Baldwin was appointed on February 11 as Chairman of the Board for the two year term and served through September 3, at which time Mr. E. Roy Albright of Mobile, his successor, was appointed and took office. During Mr. Baldwin's tenure of office he used up the entire \$1200.00 allocated to a Board member as per diem per annum.

"Question: Is his successor, who was appointed for the unexpired term, entitled to draw \$10.00 a day per diem, not exceeding \$1200.00 for the remainder of the year?"

It is my opinion that Mr. Roy Albright, appointed by the Governor to succeed Mr. Baldwin, who resigned before the end of his official year, is entitled to a per diem of \$10.00 for each day that he performs official services during the remainder of the official year of his predecessor, Mr. Baldwin, but not to exceed \$1200.00 therefor.

The pertinent part of Section 4 of the Alabama Beverage Control Act is quoted as follows:

"There is hereby created a Board named the Alabama Alcoholic Beverage Control Board, consisting of three (3) persons, all of whom shall be appointed by the Governor, with the advice and consent of the Senate, one of whom shall be designated by the Governor to be the Chairman of said Board, and said members shall receive their actual expenses while engaged in the performance of their duties, and a per diem of ten (\$10.00) Dollars per day, but not exceeding Twelve Hundred (\$1200.00) Dollars per annum. Each member of said Board at the time of his appointment and qualification shall be a resident of the State of Alabama and shall have resided in said State for a period of at least ten (10) years next preceding his appointment and qualification, and he shall also be a qualified voter therein. Of the members initially ap-

pointed, each shall hold office from the date of his appointment for the following respective terms, and until their respective successors shall qualify: One member for two (2) years; one for four (4) years, and one for six (6) years, from the effective date of this Act. Each member may be initially appointed on or subsequent to the date this Act goes into effect.

"The Governor, at the time of making and announcing the appointment of said three (3) members, as well as in the commission issued by him to each of them, shall designate which of said members shall serve for each of the said respective terms, and also which shall be the Chairman of the Board.

"Upon the expiration of each of said terms, the term of office of each member thereafter appointed, shall be six (6) years from the time of his appointment and qualification, and until his successor shall qualify. In case any member shall be allowed to hold over after the expiration of his term, his successor shall be appointed for the balance of the unexpired term. Vacancies in said Board shall be filled by the Governor for the unexpired term. Each member shall be eligible for re-appointment in the discretion of the Governor. No person shall be eligible for appointment, or shall hold the office of member of the Board, or be appointed by the Board, or hold any office or position under the Board, who has any connection with any association, firm, person, or corporation engaged in or conducting any alcoholic liquor business of any kind, or who holds stocks or bonds therein, or who has pecuniary interest therein, nor shall any person receive any commission or profit whatsoever from, or have any interest whatsoever in any purchase or sales of any alcoholic liquors, provided, however, that if any member of the Board is appointed when the Senate is not in session that such member shall hold office until the Senate has had an opportunity to reject or confirm his appointment.

* * *

"The office of the Board shall be in the City of Montgomery, Alabama. The said Board shall meet at such times within the City of Montgomery, Alabama, as the Board shall determine, and the members thereof shall be entitled to their reasonable expenses for each meeting so attended, and the per diem hereinabove referred to. A majority of the members shall constitute a quorum for the transaction of any business for the performance of any duty, or for the exercise of any power of the Board."

The Legislature foresaw that vacancies on the Board might occur; so they provided that such vacancies be filled by the appointment of the Governor. There is no restriction that such appointment could not be made until the end of the official year of any retiring member who had used up his per diem allowance for that year.

The per diem authorized by the Act is not a salary.—**Brandon, Auditor v. Askew**, 54 Ala. 605; **Gobrecht v. City of Cincinnati**, 36 N. E. 782. But the per diem is compensation to each member based on his performance of official duties on any one day, (comparable to compensation paid a juror), with a per diem restriction of one hundred and twenty days.

This remuneration applies to the member who performs the duties of the office and not to the office to which the duties performed attaches.

Hence, the Legislature failed to restrict the compensation to periodical payments to the end that no member could anticipate his entire allowance before the close of his official year. This application is further evidenced by a provision in Section 4, supra, that the Board shall meet at such times as it deems advisable, and the members thereof "shall be entitled to their reasonable expenses for each meeting so attended, and the per diem hereinabove referred to."

The last aforequoted provision, considered along with the provision for the appointment of a successor, and with the per diem authorization instead of a salary, is persuasively convincing that the Legislature did not intend that the new member, in this instance, Mr. Albright, should be denied his per diem within lawful limitations for official services rendered during the official year of his predecessor, but to the contrary, such provision and the other considerations therewith are affirmatively convincing that the law-makers intended such successor of the initial or retiring member should be paid a per diem for his official services rendered during the official year of his predecessor. In the absence of definite restrictions, I think one may reasonably presume that the Legislature intended each member of the Board, whether he be an initial appointee or a successor, should have pay for his official services rendered, but not to exceed individually the maximum prescribed for any official year.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 3, 1938

Hon. G. H. Boyd, Register,
Circuit Court, Tenth Judicial Circuit,
Birmingham, Alabama.

Court cost taxed against state, as complainant.

1. Cost upon decree of dismissal in Equity and taxing cost against complainant, the State, ex rel. Alabama State Milk Control Board, being complainant, should be paid from "Alabama State Milk Board Fund."

2. Cost upon decree of dismissal in Equity and taxing cost against complainant, the State, in re: E. T. Gilledge, as Agent of the Commissioner of Agriculture and Industries being complainant, should be paid from the "Agricultural Fund."

Opinion by Assistant Attorney General Flurry.

Dear Sir:

I have your request of September 20, 1937, for my opinion as follows:

"I would appreciate an official opinion regarding the Court costs in the following cases, that is from what funds should the Court costs be paid:

"Case No. 40852, State of Alabama, Ex Rel Alabama State Milk Control Board vs. A. W. Jones and G. C. Prewett, d/b Shady Grove Dairy.

"A decree of dismissal was rendered in this cause under date of April 15, 1937, taxing the costs against the Complainant.

"Case No. 40265, State of Alabama, Ex Rel The Alabama State Milk Control Board vs. H. G. Franklin.

"A decree of dismissal was rendered in this case under date of April 8, 1937, taxing the costs against the Complainant.

"Case No. 40746, State of Alabama, In Re: E. T. Gullledge, as Agent of the Commissioner of Agriculture and Industries of the State of Alabama vs. Golden Sunrise Natures Health Food & Age-Lax Natures Health Foods.

"A decree of dismissal was rendered in this cause under date of April 15, 1937, taxing the costs against the Complainant."

Section 6518 of the Code of Alabama 1923, provides as follows:

"The state may sue in the circuit court in chancery or equity matters, and the suit is governed by the same rules as suits between individuals. The solicitor of the circuit in which the suit is pending must attend to the same on the part of the state, and the governor may employ assistant counsel, if he deem it necessary and the circuit judge may determine the amount of compensation; and if unsuccessful, the state is liable for costs as individual suitors are. The direction of the executive of the state in writing is sufficient authority to the attorney for bringing such suit."

General Acts 1935, page 214, Section 17, establishes and provides for the "State Milk Control Board Fund" and requires the payment of all receipts from the operation of the Milk Control Board Act to the treasury as a part of said "State Milk Board Fund." Said Section further reads in part as follows: "all such money is hereby appropriated to defray the expense incurred in carrying out and enforcing powers and duties granted and imposed by this Act, which shall be paid out of the treasury upon vouchers drawn by the Board." In addition to the above, the whole Act shows the intent to make the work of this Board self-sustaining and to appropriate to its use all of the revenues received from the operation of said Act.

It is my opinion that the cost in the first two cases, referring to the Milk Control Board cases, should be paid from the "State Milk Board Fund," upon presentation of claim for said cost, in due and legal form.

The costs in the last case set out in your request, referring to the Commissioner of Agriculture and Industries, should be paid by the Department of Agriculture and Industries from the "Agricultural Fund." It is my opinion that said payment is authorized under Section 488 of the Agricultural Code, as amended by General Acts 1935, page 24, from which the following is an excerpt:

"The Commissioner of Agriculture and Industries, with the approval of the State Board of Agriculture, shall use the Agricultural Fund in accordance with the provisions of law for the support and expense of the regulatory, control and administrative work of the Agricultural Section of the Department and in such manner as said Board deems will best effect the purposes of all laws included in said Agricultural Section."

You are referred to opinion, Biennial Report of the Attorney General, 1920-1922, page 140, which clearly sets out the authority of the Department of Agriculture and Industries to pay costs in suits filed upon its behalf in the name of

the State and which are successfully prosecuted. The reasons therein stated apply with as much or more force when the suit is dismissed and the costs taxed against the complainant. The provisions of the laws relating to the Department of Agriculture and Industries, cited in said opinion and contained in General Acts of 1919, were brought forward in the Agricultural Code of 1923 and, with the same effect, to the Agricultural Code of 1927. The present laws, in the same manner as the 1919 laws, appropriate all funds, including fines and penalties in most cases, received from the operation of the Agricultural Code to the Agricultural Fund. Said court costs should be paid in accordance with the provisions contained in Section 28, General Acts 1935, page 25, providing for the method of payment of expenses incurred under the Agricultural Code of Alabama.

Although, said State Milk Board and Department of Agriculture and Industries, respectively, should pay said cost, upon due presentation of claims, they are branches of the State Government and are not subject to execution for said cost. Also the above is not to be taken as in conflict with the case of State ex rel. Stow vs. City Council, 74 Ala. 226, holding that the cost cannot be taxed against the State, the suit being in the name of the State by an individual.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 3, 1933

Mrs. C. F. Hart,
Tax Assessor,
Covington County,
Andalusia, Alabama.

Homestead tax exemption. Right of exemption of property used both as a homestead and for commercial purposes depends upon whether the dominant use is for homestead or for commercial purposes.

Opinion by Assistant Attorney General Crenshaw.

Dear Madam:

I have your letter of December 23rd in which you request my opinion as follows:

"I have a taxpayer in this county who asked me to get your opinion on the following.

"They have a house described on their assessment as an eighteen-room hotel and this has been used as a hotel for a number of years. However, three of the family live in this hotel and have always made this their home and they feel they are entitled to a homestead claim.

"Please let me know at your earliest convenience your opinion in this case."

The law in regard to such situations is set out in my two opinions in Quarterly Report, Vol. 8, page 9, and in Quarterly Report, 8, page 8. In these two opinions I held that where property is used both for homestead and for commercial purposes the controlling factor was the dominant use. If the primary use of the property is for homestead purposes the secondary commercial use would not prevent the exemption. If, on the other hand, the primary or dominant use is for commercial purposes, the fact that the parties also live in the house would not entitle the owner to the exemption. I further held therein that the primary and secondary uses of the property are questions of fact to be determined by the tax assessor. These opinions fully answer your question. It is for you to determine the question of fact, that is, whether the dominant use is as a homestead or for commercial purposes.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 3, 1938

Hon. C. E. McNatt,
Clerk, Circuit Court & Ex Officio
Clerk Law and Equity Court,
Franklin County,
Russellville, Alabama.

(1) The Judge of the Law and Equity Court of Franklin County, when sitting as a magistrate under Section 5136, Code of Alabama, 1923, may hold preliminary hearings.

(2) The Clerk of the Circuit Court and Ex Officio Clerk of the Law and Equity Court does not come under the provisions of an Act of 1936-1937, p. 268, which makes the Clerk of the County Court Clerk of the Judge of said Court when sitting as a committing magistrate.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of November 19, 1937, in which you request my opinion as follows:

"The Local Acts of 1923, page 272, Section 1, provides that the Law and Equity Court of Franklin County shall have concurrent jurisdiction with the Justices of the Peace of Franklin County in all matters whatsoever, but shall not have jurisdiction to try persons charged with felonies. Section 4 of said Local Acts of 1923, shown on page 273 provides that the Clerk of the Circuit Court shall be ex-officio Clerk of the Law and Equity Court. Section 27 of said Local Acts of 1923, as shown on page 278 provides that the County Court of Franklin County is abolished.

"Section 5136 of the Code of 1923, defines who are magistrates, and provides that Justice of the Peace and Judges of Inferior Courts are

magistrates. Section 5218 of the Code of 1923, provides that magistrates may take affidavits and issue warrants of arrest against persons who have committed public offenses, which of course, includes felonies. Chapter 213 of the Code of 1923 constituting sections 5217-5248 provides that magistrates shall have preliminary jurisdictions of public offenses and bind defendants over to the Grand Jury charged with felonies.

"(1) Does the Judge of the Law and Equity Court have jurisdiction of preliminary proceedings to sit as a committing magistrate and try persons charged with felonies and bind them over to the Grand Jury?

"I wish to call your attention to House Bill No. 71 shown by the Acts of 1936-37, page 268 providing as follows:

"(2) In all Criminal cases where the Judge of the County Court shall sit as a committing magistrate, the Clerk of the County Court shall act as Clerk to such committing magistrate in said proceedings, and when a defendant is subsequently convicted and sentenced to the Penitentiary of Hard Labor, the Clerk of the Court shall be entitled to a fee of \$2.00, to be taxed in the bill of cost etc."

"(3) In as much as the Clerk of the Circuit Court is Ex-Officio Clerk of the Law and Equity Court, and keeps all records of the Law & Equity Court, is the Clerk of the Circuit Court entitled to a fee of \$2.00, in all cases docketed in the Law & Equity Court against defendants charged with felonies if subsequently convicted? Is such clerk entitled to said \$2.00 fee in all prosecutions for felonies commenced in the Law & Equity Court, whether the defendant actually has a preliminary trial and is bound over to the Grand Jury or if said prosecution for a felony just remains on the docket in the Law & Equity Court to await the action of the Grand Jury without a preliminary trial actually being had if said defendants are subsequently convicted?

"(4) Is said Clerk entitled to said \$2.00 fee, if a defendant is charged with a felony by affidavit and warrant before the Judge of the Law and Equity Court and appears before said Judge and waives preliminary trial, and makes a Circuit Court appearance bond to appear in the Circuit Court if he is indicted by the Grand Jury, and was subsequently convicted?

"(5) I want to know if it is necessary that the Defendant charged with a felony in the Law & Equity Court must actually have a preliminary trial in said Law & Equity Court before he is subsequently convicted in order for the Clerk to collect said \$2.00 fee provided for in the General Acts of 1936-37, shown on page 268?

"Sections 21 and 12 of the Local Acts of 1923, page 272 establishing said Law & Equity Court provide that said Law & Equity Court shall have final jurisdiction of misdemeanors."

In answering your first request, that is, does a judge of the law and equity court have jurisdiction of preliminary proceedings to sit as a committing magistrate to try persons charged with felonies and bind them over to the grand jury, my answer is in the affirmative. The Judge of the Law and Equity Court of Franklin County may try these cases as a magistrate. In reaching this conclusion, I call your attention to Section 5136, Code of

Alabama, 1923. This section designates, among others, judges of inferior courts as being magistrates, and certainly the Law and Equity Court of Franklin County is an inferior court.

My answer to your requests two, three, four and five is in the negative for the reason that the law you refer to, viz., the Act of 1936 (General Acts 1936-1937, p. 268) provides, "In all criminal cases where the Judge of the County Court shall sit as committing magistrate, the Clerk of the County Court shall act as Clerk to such committing Magistrate * * *." This judge is not Judge of the County Court but is Judge of the Law and Equity Court of Franklin County which has a larger and more extended jurisdiction than the county court organized under the general laws of the State. Therefore, you, as Clerk of the Circuit Court and Ex Officio Clerk of the County Court, cannot become the clerk or the Judge of the Law and Equity Court when sitting as a magistrate.

For the reason above stated, I am answering all of the above questions or inquiries in the negative.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 3, 1938

Hon. J. H. Williams, Commissioner,
Building and Loan Department,
Montgomery, Alabama.

Building and Loan Associations—General Acts of 1931, page 218.

1. Claims of stockholders for distribution of assets in receivership may not be barred by publication of notice to file claim and demand shares within a given period.
2. If such a receivership pending under control of Building and Loan Board pursuant to Section 18 of Building and Loan Law of 1931, the Building and Loan Commissioner is charged with the responsibility of holding the distributive shares of the assets of such association.
3. No limitation of time within which stockholder may claim distributive shares.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of December 17, 1937, in which you request my opinion as follows:

"There is a State Chartered Building and Loan Association under my supervision which became insolvent and has been placed in receivership as provided by Section 18 of the Building and Loan Law (see page 226, G. A. of the Legislature, Regular Session 1931). The jurisdiction of

the Circuit Court in which the Association did business was invoked for the direction of the receiver.

"All the assets of the Association have been converted into available funds. Our receiver will within a few days be in position to make the distribution to the holders of running shares. Many of the Stockholders have moved away and it is evident that we will be unable to locate them. We are confronted with the question of making distribution to such Stockholders. Your opinion in the premises is desired as follows:

(1) Could the claims of the Stockholders or creditors whose addresses cannot be obtained be barred by having the Receiver give notice by publication in a newspaper having a general circulation in the County in which the Association did business and by letter addressed to the last known Post Office address to file claim and demand such funds within a given period and any funds not thus called for be reverted to a fund for the purpose of making a further distribution to Stockholders or creditors?

(2) If in your opinion claims for funds due Stockholders or creditors cannot be barred in the above or some other manner, would it in your opinion be the responsibility of this Department to retain possession of or control over such funds for a given period in order to make disbursement to the rightful owner in the event such are located; or would it be the duty of the clerk or register of the Court under whose jurisdiction the trust is now administered to have charge of such funds?

(3) If in your opinion the Building and Loan Commissioner or the clerk or register of the Court having jurisdiction of the trust would be expected to retain such funds to be paid over to the Stockholders and creditors upon same being located, how long in your opinion should such funds be held and what disposition should be made of any such funds remaining at the end of said period?

"We shall await with interest your opinion in the premises."

In the body of your letter you refer to a "distribution to the holders of running shares" and "distribution to such stockholders." However, in the questions propounded you refer to "stockholders or creditors" as if the same were synonymous. The right of a general creditor and the right of a stockholder are very materially different. As you know, a creditor does not own any interest in the corporation, while a stockholder, by reason of his relationship, is not entitled to collect money from the corporation, but is merely a part owner of all the assets of such corporation. The tone of your letter leads me to believe that when you refer to "stockholders or creditors" you refer to the right of stockholders who, under the Building and Loan Law, pay dues to the corporation for shares of stock with the right to withdraw such shares at the times described by the by-laws of the Association. Strictly speaking, such parties are not creditors and, except in England, it is now well settled that there is no priority between withdrawing and non-withdrawing stockholders. 9 C. J. 996; *Miers v. Columbia Mutual Building and Loan Association*, 157 Fed. 940; *Coltrane v. Baltimore Building and Loan Association*, 110 Fed. 272; *Pacific Coast Savings Society v. Sturdevant*, 165 Cal. 687, 133 Pac. 185; 49 L. R. A. (N. S.) 1142 and Note.

In answering your specific questions, therefore, I must base my opinion on the question as applied to the rights of stockholders.

1. Your first question is whether the claims of such stockholders whose addresses cannot be obtained may be barred by having the receiver give notice by publication and by letter requiring such stockholder to file claim and demand funds within a given period. In my opinion, this cannot be done. Under the terms of the act the receiver is required to collect all of the assets of the Association, then,

"He shall pay and procure the discharge of all privileged debts and obligations of the Association, and after paying legal and other expenses of his receivership, which should be approved by the Board, he shall distribute the balance of the assets from time to time under orders from the Commission, pro rata to the liabilities of the Association, to its members and certificates in proportion to the sums paid in on its several outstanding shares and certificates unpledged."

Clearly this is a definite statutory mandate for the receiver to distribute the shares in proportion to the amounts paid in thereon. There is no exception or proviso in such statute as to shareholders who are non-residents or whose addresses can not be obtained at the moment. Bearing in mind that the right of these shareholders is property, which cannot be taken away from them except by due process of law, I find no sufficient authority for permitting the forfeiture of their interest to the benefit of a fund for other shareholders, merely because of their failure to appear and demand their shares in answer to either a published notice or a letter addressed to the last known address. These methods of giving notice cannot, in my opinion, be considered due process of law without a sufficient statutory provision authorizing the adoption of such procedure in this particular case. It is, therefore, my opinion that the receiver must use reasonable efforts to give notice to all shareholders of the proposed distribution. The failure of such shareholder, however, to claim his property share within any given time will not, in my opinion, forfeit his right thereto.

2. Your next question is a very difficult one for me to answer. In the first paragraph of your letter you state that the jurisdiction of the Circuit Court was invoked for the direction of the receiver. Apparently, however, this receiver was not appointed by the court under the general equitable jurisdiction of receivers. From the first sentence of your letter it seems that this receivership was commenced under the terms of the Building and Loan Law above cited. This law makes no reference to proceedings in the Circuit Court. Your question is whether your Department must retain possession of the distributive shares of the stockholders, or whether the funds should be administered by the clerk or register of the court "under whose jurisdiction the trust is now administered." This question is difficult for the to answer because of my hesitancy to give an opinion on any matter now pending in the courts. If such receivership is pending in the court, the jurisdiction and procedure must be determined by that court and my office must decline to given any opinion as to the rights and duties of the receiver who would be an officer of that court. On the other hand, if such receiver is acting by virtue of the statutory provisions of the Building and Loan Association and not under the control of the court, then and only then can I advise you as to the duties of such receiver. If that be true, that is, if the receiver is not acting under the orders and control of the court, then clearly it is the duty of the Building and Loan Department to retain control of the funds and the register or clerk of the court would have no jurisdiction thereof. On the other hand, if, as you state at one place in your letter, the trust is being administered under the jurisdiction of the court, then the question of the control and disposition of the proceeds would necessarily be a matter

for the determination of that court and I express no opinion as to the duty or procedure of the court or of the receiver acting under the control of the court.

3. I believe I have indicated the necessary answer to your third question. In the absence of a definite statute there is no limitation on the right of the stockholder to appear and claim his share of the funds in the hands of the Building and Loan Commission. There is no such limitation statute found in the Building and Loan Association Law.

By analogy I call your attention to the holdings that the interest belonging to persons unknown at the time of a corporation dissolution does not escheat to the state. *Scott v. Getting*, 125 Md. 595, 94 Atlantic 209, 14 A. C. J. 1197.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 3, 1938

Hon. M. H. Harper, Chairman,
Unemployment Compensation Commission,
Montgomery, Alabama.

Dear Sir:

Your letter of December 29, 1937 has been received. Your letter follows:

"I respectfully request your opinion as to whether contributions due under the provisions of the Alabama Unemployment Compensation Act, paid to the Register in Chancery of the Circuit Court of Montgomery County, Alabama, pursuant to an order of that court, to be held in escrow pending final determination of the validity of the Alabama Unemployment Compensation Act, which contributions were subsequently paid to this Commission by the Register upon the act being declared constitutional, constitute payments to this Commission as of the date such contributions were paid into court, or as of the date such contributions were given to this Commission by the Register in Chancery.

"This determination is necessary in order that we might know what dates should be certified to the United States Treasury as being the dates on which payments were made to this Commission by subject employers. You are familiar, of course, with Section 902 of the Social Security Act which allows a taxpayer to off-set against the tax imposed by Section 901 of the Social Security Act the taxes paid to a State Unemployment Compensation Agency, if paid by such taxpayer before the date of filing his return for the taxable year."

It is my judgment that a taxpayer who paid the tax or contribution into the Registry of the Circuit Court of Montgomery, Alabama, on or before April 1, 1937 is entitled to the off-set against the tax imposed by Section 901 of the Social Security Act.

In those cases where the tax or contribution was paid into the Registry of the Circuit Court of Montgomery, Alabama on or before April 1, 1937, the Alabama Unemployment Compensation Commission was authorized to certify to the Treasury Department in Washington that such payment was received by the Alabama Commission as of April 1, 1937, although the money might not actually have reached the Alabama Commission until sometime thereafter. Payment into the Registry of the Court under these conditions amounts to a constructive payment to the Alabama Commission and it is not conceivable that such a taxpayer or contributor would not be allowed the credit or off-set provided by Section 901 of the Social Security Act merely because the money did not actually reach the Alabama Commission until some days, weeks, or months after April 1, 1937.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 4, 1938

Hon. R. E. Adams,
Judge of Probate,
Escambia County,
Brewton, Alabama.

License—Fireworks—Dealer in fireworks required to procure license for each place of business under Schedule 63 of the Revenue Code of 1935.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of December 23, 1937, in which you request my opinion as follows:

“Please refer to Schedule 63 of the Revenue Code of 1935.

“Mr. J. W. Warden of Brewton is the owner and operator of a Variety Store at Brewton and also operates a similar store at Flomaton. Mr. Warden paid a Fire Works for his Brewton Store but failed to buy a license for his Flomaton Store, where he is also selling Fire Works. It was his belief that the payment of one State and County license for selling Fire Works would suffice for both stores.

“The License Inspector has cited Mr. Warden to purchase a license for his Flomaton store and he has deposited the proper amount of such license with me, pending an official opinion from you as to whether his contentions are correct or if he must purchase a separate license for each store.”

In my opinion, under the facts detailed by you, Mr. Warden must properly pay a license for selling fireworks at both his Brewton store and his Flomaton store.

Your attention is directed to Section 350 of the Revenue Laws of 1935 (Simon's Revenue Compilation, pp. 441, 442) wherein it is provided:

"Section 350. * * * (a) Whenever a license is levied in this Act, there shall be collected both a State and County license for **each place of business**, except as specifically otherwise provided."

Schedule 63 of said Revenue Laws (Simon's Revenue Compilation, p. 242) provides as follows:

"Schedule 63. Each dealer in FIREWORKS such as roman candles, sky rockets, torpedoes, fire crackers, canon crackers, cap guns, devil wheels and such other articles commonly know as fireworks, in cities or within two miles of said cities, of:

"25,000 population or more	\$50.00
10,000 to 25,000	30.00
5,000 to 10,000	20.00
All other places whether incorporated or not.....	10.00."

You will note that the foregoing schedule makes no specific provision authorizing a licensee to operate as many places of business as he desires upon the payment of one license. Therefore, under the provisions of Section 350 (a) there should be collected both a State and County license for each place of business.

The foregoing conclusion is strengthened by further reference to Section 350 which provides that the license issued to the party applying for same should set forth and specify the name of the person etc. applying therefor, the business or act which it is proposed to carry on or do thereunder, and "the name of the street or location where it is proposed to carry on the same * * *." It will thus be noted that the general license provisions of the Revenue Laws contemplate that a license issued shall be for the operation of a single place of business, which place shall be designated on the face of the license form issued to the licensee, and that these general provisions require a party operating another place of business, other than that designated on the face of the license obtained, must acquire a new or additional license.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 4, 1938

Hon. Chas. W. Lee,
State Comptroller,
CAPITOL.

Taxation—Refund of taxes paid on property exempt as a homestead—Section 296, Chapter 6, Article VIII, General Acts 1935, p. 379.

Taxpayer who, through mistake or error, pays 1936-1937 taxes without receiving credit thereon for homestead exemption lawfully claimed and allowed is entitled to refund of the excess.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your communication of recent date, which is as follows:

"I am attaching hereto, a copy of petition for refund which has this date been received by me, same being sent by the Petitioner, Luella Williams, of Mobile County, Alabama.

"The petitioner avers that through error, she failed to make a deduction of the sum of \$1.95 representing the amount alleged to be due her by virtue of the Homestead exemption: I quote from the petition, i. e.

' * * * through mistake or error, or by reason of double assessment or other error made to Tax Collector taxes which were not due and collectible upon the property of the Petitioner: that said payment was not made voluntarily by Petitioner with full knowledge of the facts and that said payment as made on account of **petitioner paid 1937 taxes in full without having presented her credit certificate covering homestead exemption amounting to \$1.95 etc.** * * *'

"Please advise me if a refund in a case of this kind may be made under and in accordance with Section 296, Chapter 6, Article 8, on page 124 of the 1935 Revenue Code of Alabama."

It is my opinion that the applicant whose name is signed to the petition for a refund, which petition is attached to your letter, is entitled to the refund. I assume that the statements made in the said petition are true and correct, and that the applicant had lawfully claimed her homestead as exempt, and had received a credit memorandum therefor issued pursuant to an opinion of this office to Hon. T. L. McKee, Tax Collector, Chilton County, Clanton, Alabama, dated September 23, 1937, appearing in Volume VIII of Quarterly Report of Attorney General, p. 292, and that she failed to receive credit for the amount of such certificate when she paid her taxes.

In the opinion to Mr. T. L. McKee, *supra*, this office held as follows:

"The failure of the tax assessors separately to list and value the homestead and to credit the taxpayer with an amount equal to the state taxes on such homestead necessitated, after the rendition of the foregoing opinion, issuance of a proper credit on the amount of the taxes

certified by the tax assessor to the tax collector as being due by the taxpayer. A certification without such credit was an error on the part of the tax assessor which he is authorized to correct."

The certificate which the tax assessor issued was a credit upon the amount of applicant's taxes which he certified to the tax collector as being due.

Presentation of the certificate is merely evidence of such credit. The payment of the full amount of taxes on the homestead without regard to the exemption was an error and such excess may be lawfully refunded pursuant to the authority contained in Section 296, Chapter 6, Article VIII, General Acts 1935, p. 379, which I quote as follows:

"Section 296. Any taxpayer who through any mistake, or by reason of any double assessment, or by any error, in the assessment or collection of taxes, or other error, has paid taxes that were not due upon the property of such taxpayer, shall, unless such tax was with knowledge of the facts voluntarily paid by the taxpayer, be entitled, upon making proof to the satisfaction of the State Comptroller of such payment, to have such taxes refunded to him if application shall be made therefor, as hereinafter provided, within two years from the date of such payment."

I, therefore, conclude that you are lawfully authorized to make such refund. The State of Alabama has received taxes to which it was not lawfully entitled, and to which no claim was made. The payment in my judgment was such an error as is contemplated by Section 296, supra.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 4, 1938

Hon. W. E. Butler,
Judge of Probate,
Madison County,
Huntsville, Alabama.

License taxation—Motor Vehicle License—

Motor Vehicle License tag issued to a National Guard Officer who claims exemption from the payment of the license under General Acts, 1935, p. 525, may not be transferred, upon the sale of said vehicle to which it is attached to the vendee, under Schedule 158.14 of the Revenue Acts of 1935.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion in which you inquire upon the following state of facts:

A motor vehicle license tag was duly issued to a National Guard Officer without the payment of the license therefor, the said officer claiming exemption under the so-called Quarles Act. During the license tax-year, the National Guard officer sold the said automobile with tag attached to a vendee, who was not entitled to any exemption by reason of connection with the National Guard or otherwise; that application was made to you, as probate judge, for transfer of the license tag under the provisions of Schedule 158.14 (a) of the Revenue Acts of 1935; that when examination was made of your books and records by the Department of Examiners of Accounts, the sum of \$18.00 was charged back to you by reason of said transfer.

In my opinion the charge was properly made.

Transfer may be made only of motor vehicle license tags which have been bought for the current license tax year for motor vehicles and the said motor vehicle should have been transferred to a new owner, etc.

A National Guard Officer who claims the exemption of the Quarles Act, supra, does not buy a license tag, but is issued the same by virtue of the exemption granted to him. Under the plain and unambiguous terms of Schedule 158.14, a license tag which has not been "bought" does not stay with the motor vehicle in the hands of a new owner and may not be transferred. The exemption is only to the exemptioner and does not extend to his vendee.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 4, 1938

Hon. R. A. Leath, Sheriff,
Etowah County,
Gadsden, Alabama.

Fees—Fees of sheriff serving process issued by Juvenile Court governed by Section 3558.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

This is to acknowledge your letter of inquiry, which is as follows:

"Please give me your official opinion how Etowah County should pay the Sheriffs for serving process issued by the Juvenile Court. I will thank you to give me this opinion as early as possible as the Board of Revenue of this County is holding my fees, waiting for an opinion from you."

As the Juvenile Court of Etowah County operates under the general statute, I refer you to Section 3558 of the Code of Alabama, 1923 for the provision governing costs. Said section is as follows:

"Section 3558. OFFICER SERVING PROCESS, ETC., UNDER JUVENILE COURTS: COSTS AND FEES OF.—All officers serving process from juvenile courts, or feeding prisoners committed by, or held for or under such courts, shall receive the same costs, fees and compensation payable in the same manner and from the same source as are now allowed and paid for like services with respect to process issued by the circuit courts or courts of like jurisdiction, and for feeding prisoners committed by circuit courts or courts of like jurisdiction." (Italics supplied)

I also refer you to Quarterly Reports of Attorney General, Volume 2, page 28.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 4, 1938

Hon. Harry Simon,
Chief Clerk, License Division,
State Tax Commission,
CAPITOL.

Taxation—License—Act 231, General Acts of 1937, page 279, Schedule 123½.

Payment of privilege license to wholesale lumber imposed by Schedule 84, Section 348, Act No. 194 (Revenue Act), General Acts of 1935, page 256, exempts all planing plants of licensee from license imposed by Schedule 123½, supra.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

You have transmitted to me the following inquiry:

"The Smith Lumber Company, of Red Bay, Alabama, own and operate a planing mill at Red Bay and Nauvoo. Under the provisions of Schedule No. 84 of an Act entitled 'An Act to provide for the general revenue of the State of Alabama' they procured a wholesale lumber yard license for their plant located at Red Bay. House Bill 182, approved March 2, 1937, levies a privilege license on planing mills, which is Schedule 123½. Since they procured such wholesale lumber dealer's license for their plant at Red Bay, are they required to obtain a license under Schedule 123½ for either of the two mentioned plants?"

It is my opinion that Smith Lumber Company is not subject to the payment of license for operation of either planing plant mentioned in the above inquiry.

Act No. 231, approved March 2, 1937, appearing in General Acts of 1936-37, page 279, imposes a license tax upon "each person, firm or corporation engaged in the operation of a veneer mill, planing mill, box factory, handle

factory, or any other factory where lumber or timber is sawed or made into a finished or semi-finished product, other than a saw mill licensed under Schedule 123," but has incorporated therein the following provision:

"It is the intention hereof that where a person, firm or corporation shall pay a privilege tax under Schedule 123 or Schedule 84, then no privilege license shall be charged or collected hereunder."

The payment by Smith Lumber Company of a license under Schedule 84, Revenue Act of Alabama, which imposes a license tax for the operation of a wholesale lumber plant, carries with it an exemption from the license tax imposed by said Schedule 123½, supra, for the operation of the two planing plants mentioned in your inquiry. The exemption is mandatory under the provisions of said Act No. 231.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 5, 1938

Hon. Chas. W. Lee,
State Comptroller,
CAPITOL.

Statutes—Local Acts 1936-37, page 22 creating the County Court of Russell County, Alabama, not violative of Sections 105, 168 or 280 of the Constitution.

The Act provides for payment of the fees accruing to the clerks and sheriffs for services rendered in said court in cases in which the defendant is acquitted, or in which nol. pros. is entered or the cause is abated by death or execution returned "no property found", from the County Court Fund thereby created.

The Act provides that State witnesses' fees shall be paid from said County Court Fund, and that such payment shall have priority over the payment of the fees of the clerk and sheriff in cases in which nol. pros. is entered, the defendant is acquitted, the cause is abated by death or execution returned "no property found."

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"The County Court of Russell County was created by extra session of the Legislature of 1936-1937, see Act No. 39, pages 22, 23 and 24 of the Local Acts.

"Please advise me as promptly as possible on the following questions:

"1. Is this Act Constitutional, wholly or in part?

"2. Does Sections 2 and 3 provide for paying Clerk and Sheriff fees accruing to them in cases in the County Court of Russell County that are Nolle Prossed, Acquitted, Abated by Death, or Execution returned "No Property Found" from the County Court Funds created by Section 8 of this Act?

"3. Are Witness Fees in such cases as listed in 2 payable from the County Court Fund and if so, are such Witness Fees preferred claims over the Clerk and Sheriff Fees?

"This information is essential to examination now in progress and an early response is desired."

In my opinion, your first inquiry must be answered in the affirmative.

Article 3 of Chapter 113 of the Code of 1923 reestablished County Courts in counties of less than fifty thousand population in which such courts had not been abolished since September 25, 1915.

By Local Acts of 1931, page 146, the County Court of Russell County, established under the above cited chapter of the Code, was abolished. Therefore, there was no law of general application providing for a County Court in Russell County at the time of the enactment of the Act in question at the 1936-37 session of the legislature.

By Local Acts, 1927, page 215, an Inferior Court in lieu of Justice of the Peace was established in Precinct One in Russell County, which was called the Inferior Court of Phenix City, in conformity with Section 168 of the Constitution.

The County Court established by the 1936-37 Act, supra, provided that "the present judge of the Inferior Court of Phenix City be appointed the first judge of the said County Court," thereby established, and should hold office until the first Monday after the second Tuesday in January, 1941, then to be succeeded by the person elected to the said office at the general election of 1940.

That portion of the Act designating the present judge of the Inferior Court of Phenix City as the judge of the County Court thereby created does not undertake to impose two judgeships upon the incumbent in that office but is merely descriptive of the person whom the legislature provided should serve as judge of said Court until after the 1940 elections. Had it undertaken to provide that the same person should hold the judgeship of the Inferior Court of Phenix City and the judgeship of the County Court, it would run afoul of Section 168 and 280 of the Constitution, the one limiting the jurisdiction of Inferior Courts in Lieu of Justices of the Peace and the other inhibiting the holding of two offices of profit at the same time. Cf. Lea's case, 211 Ala. 68.

Your first inquiry is laid in very general terms, and I have not undertaken to square the local statute in question with every section of the Constitution. I have assumed that it was properly advertised in compliance with Section 106 of the Constitution and that its passage through the legislature was regular. I understand your inquiry is directed primarily to the question of its compliance with Sections 105, 168 and 280 of the Constitution. If there is any other question as to its validity as to which you entertain doubt, I shall be glad to answer a specific inquiry.

Answering your second inquiry, it is my opinion that the fees accruing to the clerk and the sheriff in cases in which nol. pros. is entered, or the defendant is acquitted or the cause is abated by death or execution is returned nulla bona, may properly be paid out of the County Court Fund created by Section 8 of the Act.

Sections 3, 6, 8 and 15 of said Act provide:

"SECTION 3. That the Clerk of the Circuit Court of Russell County, Alabama, shall be ex-officio clerk of the County Court of Russell County, Alabama, and his fees and the method of paying same shall be as allowed to him by law for similar services in the County Courts of this State."

"SECTION 6. That the Sheriff of Russell County, or his deputy, shall attend all sessions of said court, serve all processes, and his fees and compensation for his attendance and services in connection therewith shall be the same as allowed to him by law for similar services in the County Courts of this State."

"SECTION 8. That all fines, penalties and forfeitures imposed by said court, Solicitors' fees and trial tax shall be collected by the Clerk and paid into the Depository of the County, and shall constitute a fund known as 'County Court Fund', and shall be kept separate from all other county funds."

"SECTION 15. That during the month of January of each year, the Chairman of the County Commissioners or other governing body of the County and the Judge of this court shall confer and agree upon what amount from said fund may be transferred to the General Funds of the County, leaving sufficient amount in said County Court Fund to meet the obligations and charges against same, and insure sufficient balance to meet the needs of said Court, and said amount when agreed upon shall be transferred to the general funds of the County."

The evident intention of the legislature was to create the County Court Fund and provide for the payment of the fees of officers and witnesses and other charges therefrom, in lieu of having the same paid out of the County Fine and Forfeiture Fund.

Sections 3 and 6 provide that the clerk and the sheriff shall receive the same fees and the method of payment shall be the same for similar services in the County Courts of the State.

Under the general law pertaining to payment of officers' fees in County Courts, it is provided that fees of clerks and sheriffs, where no conviction is had, shall be governed by the provisions of law applying to services in the Circuit Court or in preliminary proceedings. Section 3758 of the Code of 1923.

Answering your third inquiry, it is my opinion that State witness fees are payable from said County Court Fund in the same manner as is provided by Section 3769 of the Code for the payment of State witnesses from the Fine and Forfeiture Fund; and the right of the officers to collect their fees from the County Court Fund shall be postponed to the rights of State Witnesses to the payment of their witness fees, in the same manner that provision is made in Section 3740 for such postponement in the case of payment from Fine and Forfeiture Fund of fees accruing in other courts.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 5, 1938

Hon. Chas. W. Lee,
State Comptroller,
CAPITOL.

Special Liquor Referendum Election:

1. Sheriff not entitled to fee for delivering list of absentee voters to their respective boxes.
2. (a) Sheriff not entitled to fee for delivering ballot boxes.
(b) Sheriff not entitled to fee for notifying election officers of their appointment.
3. Sheriff not entitled to fee for issuing certificates to election officers.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

This is to acknowledge your letter of inquiry as follows:

"Incident to the Special Election held March 10th, 1937, various expenditures were incurred by the Counties in holding said election: Section 51 of the Alabama Beverage Control Act says, in part as follows, viz.,

" * * * all of the expenses of said Election shall be paid by the State, and the returns etc. * * * "

"Several bills have been presented to this office for payment by various Counties and before payment can be made we desire that you advise us on the following specific charges as made, to wit:

"1. The Sheriff of a County has presented a Bill in which he has charged .10c per mile for delivering list of voters who voted absentee ballots, to their respective home boxes.

"2. Another sheriff has presented a bill identical with the following, viz.,

"(a) 'For repeal election March 10th, delivering ballot boxes and straightening out the election officers at 39 prcts.—\$117.00.'

"(b) 'Notices to Inspectors and Clerks for 39 Prcts, at \$3.00 per day—\$117.00.'

"This bill is properly certified by the Sheriff.

"3. Another Sheriff has presented a bill for delivering 33 Boxes for Election—\$16.50.

"4. Still another Sheriff has presented a bill for (a) issuing and delivering Election Officers Certificates @ .50c each, also (b) delivering Ballot Boxes at .50c each.

"5. Another Sheriff has rendered a bill in which he makes a charge of \$.65 for each of a large number of subpoenas delivered.

"Will you please advise me if each of the items numbered from one to five inclusive, are legal charges against the State and come within the provisions of and provided by Section 51 of the Beverage Act."

In reply to your first inquiry, I refer you to Act No. 178, Section 5, General Acts 1933, p. 193, which amends Section 406, Code of Alabama, 1923:

"Section 5. In addition to the managers and clerks now provided under the laws of this state for elections, there shall be, for all future elections, whether primary, general, special, or municipal, appointed at the same time and in the same manner by the appointing board of the county or city, three managers, two clerks, and a returning officer, who shall meet in the office of the Judge of Probate of the county, (or, except in the case of municipal elections, in a place to be designated by the appointing board) on the day of said election and remain, as officers at other polling places, for the purpose of receiving the ballots of absentee voters from the Judge of Probate, or other person authorized to handle them, as provided herein. The absentee ballots cast as provided by law shall be, by said election officers specified in this section, tabulated separately by precincts, and returns thereof made as now provided by the laws governing the conduct of elections. The managers, clerks and returning officer provided for in this section shall be governed in all respects in the performance of their duties by the laws governing all elections, and shall be subject to the same penalties as other election officers. Provided, however, that the officers appointed under the provisions of this section may begin tabulating said absentee ballots as soon as they are received by them from the person authorized to deliver same. Provided further, that this section shall not apply to municipal elections in cities and towns whose population is less than 10,000 inhabitants."

I am of the opinion that your inquiry should be answered in the negative. There is no provision of law authorizing the sheriff to deliver a list of voters, who voted absentee ballots, to their home boxes.

I am of the opinion that parts (a) and (b) of your second inquiry should be answered in the negative. In reference to part (a), I refer you to Section 436, Code of Alabama, 1923, which charges the probate judge, the sheriff, and the clerk of the circuit court with the duty of providing ballot boxes at voting places. Any one of these three officers can actually deliver the boxes. However, as Section 496 requires the sheriff to deliver stationery and supplies to the inspectors, the sheriff, as a matter of general practice, usually delivers the boxes. In reference to part (b), I refer you to Section 438, Code of Alabama, 1923, which makes it the duty of the sheriff to notify each inspector, returning officer and clerk of his appointment.—**Biennial Report of Attorney General, 1918-1920, p. 196.** As there is no fee provided for either of these services, it is my opinion that the items listed in your inquiry are not legal charges against the State.

I am of the opinion your third inquiry should be answered in the negative for the reason stated under part (a) of the answer to your second question.

I am of the opinion that parts (a) and (b) of your fourth inquiry should be answered in the negative. With reference to part (a), I refer you to Section 509, Code of Alabama, 1923 which states that, "upon proper proof of services rendered," the payment of election officers shall constitute a preferred claim. There is no authority, as far as I am aware, which authorizes payment of the sheriff for issuing election officers certificates. Part (b) is answered by the answer to part (a) of question two.

With further reference to your inquiries numbered 2, 3, and 4, I am of the opinion that claims for such services do not constitute "expenses" as contemplated in Section 51 of the A. B. C. Act. However, had such services been

rendered in an election where the county pays these expenses, the sheriff could have claimed ex officio fees therefor. If the claims had been regular in all respects and allowed by the county governing body, they could have become legal claims against the county under the authority of Section 7287, Code of Alabama 1923, as amended by Act No. 210, General Acts 1931, page 261. However, the election of March 10, 1937 was not an election where such expenses are paid by the county. Therefore, as the A. B. C. Act makes no provision for the payment of ex officio fees, I am of the opinion that there is no provision of law authorizing the payment of such claims in the election referred to above. In my opinion the question turns upon the differentiation between what is a legal claim, per se, in an election and what may become a legal claim allowable as an ex officio fee.

Your fifth inquiry, in my opinion, should be answered in the negative. Section 580, Code of Alabama, 1923 is the only authority, as far as I am aware, for issuing subpoenas in an election. This applies only in case of a contest.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 5, 1938

Hon. Charles W. Lee,
State Comptroller,
CAPITOL.

Homestead Exemption—Taxes 1937-38—Time for claiming.

Exemption of homestead from State taxes for the year 1937-38 must be claimed on or before the third Monday in January of the current tax year.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry as follows:

"1. What is the final date a taxpayer may file claim for homestead exemption for the tax year 1938, viz; on assessments delinquent after the third Monday in January, 1938, and due and payable October 1, 1938?

"2. Does the same or a different rule obtain with reference to Jefferson County, particular reference being made to Act No. 176, General Acts of 1936, page 205, as amended by Act No. 48, General Acts of 1936-37, page 34, and if a different rule please state?"

Before proceeding with an answer to your inquiry, I wish to direct your attention to an opinion of this office, dated October 5, 1937, addressed to Hon. Madison L. Smith, Tax Assessor, Washington County, Chatom, Alabama, in which it was held that "The Legislature imposed upon the (homestead) exemption a mandate to the taxpayer that he must assert his claim therefor, or failing therein, that he waives the gratuity." Also I wish to call your attention to another opinion of this office, dated October 22, 1937, addressed to Hon. O. L. Bethune, Tax Assessor, DeKalb County, Fort Payne, Alabama, in which we held that the claim for homestead exemption must be asserted before the Tax Collector invokes the machinery of the State to

enforce tax collection. This opinion was specifically limited to homestead exemptions from State taxes for the tax year 1936-37.

Answering inquiry number one, quoted above, it is my opinion that the taxpayer must assert his or her claim for a homestead exemption on or before the third Monday in January, 1938, or failing therein, he waives the same for the then current tax year.

The aforementioned conclusion fixes a limitation co-extensive with the time fixed by law for return of property by a taxpayer. Section 41, Revenue Code of Alabama, for 1935. After the third Monday in January of the then current tax year, the right of a taxpayer to return his property for taxes for the current tax year is foreclosed. Section 41, *supra*. Thereafter, the tax assessor is required to return the property for taxes for that year. However, as I have already stated in the opinion to Hon. Madison L. Smith, *supra*, there is no duty on the tax assessor to ferret out homesteads and grant the exemption.

The Legislature, by an amendatory act appearing in General Acts of 1936, page 4, provided that all homesteads should be separately listed and valued. This provision is written into the Act along with the other provisions imposing upon "every person in every election precinct to attend in person * * * then and there render to the assessor under oath a full and complete list of all property of which he was the owner * * *, and to enter upon such paper the amount of fire insurance carried upon any of the property so listed." Then follows the mandate to list and value the homestead. The effect of this mandate is to require a return by the taxpayer, by **separate description and valuation**, of his homestead, such return being nothing more than a return of his exemption if he seeks one. The failure of the taxpayer to make this return of his exemption before the third week in January, under oath, amounts to a waiver of such gratuity.

It is my judgment that the same rule obtains with reference to Jefferson County, even though the Legislature, by adoption of Act 176, General Acts of 1936, page 205, excepts the taxpayers of Jefferson County from the general rule that requires the filing of returns of real property, and authorizes the tax assessor of Jefferson County to make the returns for the taxpayer. It is to be noted that there is no provision in this act which forbids a taxpayer of Jefferson County to return his real property for assessment, nor is there any provision in the act **requiring** the assessor separately to list and value the homestead. Without such specific imposition, there would be no duty on the part of the tax assessor of Jefferson County separately to list and value such homestead in the return he makes, nor would there be any authority on his part to assert the claim for the homestead exemptioner in Jefferson County. Act 176, *supra*, does not go that far.

Therefore, if the taxpayer wants the gratuity which the State offers in the form of an exemption of his homestead from the payment of State taxes, it is incumbent upon such taxpayer to appear before the tax assessor of Jefferson County, on or before the Third Monday in January of the then current tax year, and then and there separately to list and value his homestead, under oath, on such form as the State Tax Commission may prescribe under authority of Section 27, Revenue Act of Alabama, 1935. The taxpayer of Jefferson County is under as much duty to **return his homestead for exemption** as the taxpayer in any other county of the state which does not have the population classification prescribed by Act 176, *supra*, establishing the "unit system" in counties with a population of 200,000 or more.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 5, 1938

Hon. M. W. Forman,
Judge of Probate,
Ashville, Alabama.

Person attending court in response to a subpoena duly issued is entitled to per diem and mileage, even though his services are not required and he is excused for any cause.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of November 15, 1937, in which you request my opinion as follows:

"We have had a non compos mentis hearing in this Court and one of the jurors who was summoned was disqualified because he was related to the wife of the insane man. Please advise me whether or not this disqualified juror is entitled to pay even though he did not sit at the hearing."

I am of the opinion that the juror mentioned in your letter is entitled to pay, even though he did not sit at the hearing. A person attending court in response to a subpoena duly issued is entitled to per diem and mileage, even though his services are not required and he is excused for any cause.

This conclusion is in accordance with an opinion heretofore rendered by this office on September 10, 1935 and found in Vol. VI-A, Office Edition of the Attorney General.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 5, 1938

Hon. P. A. McDaniel, Jr.,
County Superintendent,
Barbour County,
Clayton, Alabama.

Schools—

1. County Board of Education may pay insurance premiums upon school buildings only when said Board has an insurable interest and only to the extent of said interest.

2. County Board of Education may lease from town of Louisville school building used for school purposes by the County Board of Education under its control.

Opinion by Assistant Attorney General Flurry.

Dear Sir:

I have your request of October 25, 1937, from which I quote as follows:

"About twenty years ago, the citizens of Louisville, Barbour County, Alabama, erected with the aid of the Town Council of that community a brick school building which was deeded to the Town of Louisville.

"Since the construction of the building, the property has been used solely and exclusively for such purposes as other public school buildings are used. For years, the elementary and high school departments of the Louisville school were conducted in this building.

"In recent years, the County Board of Education has erected on a different lot an elementary building and from that time on to the present date the municipally owned property has housed the high school departments only.

"The building in question—present high school building—has from the time of its erection been used for public school purposes; in fact, was constructed therefor.

"Now, I wish to know whether, through inference or legislative intent based on the Act above referred to (General Acts 1932, page 245) or by application of the principle of law set forth in the opinion of Assistant Attorney General Evans (Biennial Report 1926-1928, page 609), or both, the County Board of Education has an insurable interest in the municipally owned school building of the Town of Louisville, Alabama. If your answer to this query is in the negative, then I wish to know if the County Board of Education can, under the terms of a rental contract to be entered into with the Town of Louisville, rent from the Town of Louisville the building owned by the Town for public school purposes specifically stipulating by the terms of the contract that the rent shall be in the even sum represented by the amount of the premiums of the policies covering the properties. And I would like to know, if such contract is legal, if it would give to the County Board of Education such insurable interest in the building as would qualify the properties for a policy with the State Board of Administration."

The Biennial Report, 1926-1928, page 609, appears to have been based upon a case in which the County Board of Education has in its custody and under its control a certain school building used for school purposes, as agents or trustees. Such agents and trustees have an insurable interest in the property. Under the statements contained in your request, it appears that the County Board of Education hold neither the legal or equitable title, both of which is vested in the Town of Louisville. The only interest which the County Board of Education has in the building referred to, is a tenancy at will. "A permissive occupation of real estate, where no rent is reserved or paid and no time is agreed upon to limit the occupation, is a tenancy at will." 35 C. J. 1122. This appears to be the circumstances of your case.

Although it has been decided by the courts of a few states, other than Alabama, that a tenant at will has an insurable interest, such interest would be limited by the extent of the interest of the tenancy at will. This would not be the same as the value of the building and would not authorize the insuring of the building, based upon the value of the building, by the County Board of Education. This would not meet the proposition requested by you, since I understand that you desire to have the value of the building insured.

In reply to your request relating to authority of the County Board of Education to enter into a lease of the building from the Town of Louisville, at a rental equal to the insurance premium which the Town of Louisville would have to pay in order to insure the same, it is my opinion that this question should be answered in the affirmative. Section 132 of the School Code of 1927, which is in part as follows:

"The County Board of Education shall have the right to acquire, purchase, or by the institution of condemnation proceedings if neces-

sary, lease, receive, hold, transmit or convey the title to real and personal property for school purposes."

Under the above authority the County Board of Education may lease the said building for a rental equal to the amount of the insurance premium, provided the County Board of Education finds said amount not to exceed a reasonable rental for said property.

In case the County Board of Education leases the property from the Town of Louisville, under the above arrangements, the latter should be obligated to carry the insurance and therefore, it is unnecessary to consider your question with reference to the State Board of Administration. This opinion does not affect the rights of the County Board of Education, with reference to any personal property which it may have placed in the building or as to other insurable interest which it may have. It is limited to the question of insurance upon the building with reference to the value of said building.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 6, 1938

Unemployment Compensation Commission,
Montgomery, Alabama.

Attention: Hon. J. Eugene Foster, General Counsel.

Unemployment Compensation Commission—Held that resolution legally adopted by Unemployment Compensation Commission in accordance with rules and regulations of the said Commission, legally and duly constitutes the Chairman of the Unemployment Compensation Commission as the proper person to requisition funds from Treasury of the United States Government for payment of benefits.

Opinion by Assistant Attorney General Small.

Gentlemen:

I have your request under date of December 13, 1937, as follows:

"Section 3(d) of the Alabama Unemployment Compensation Act provides, 'the Commission shall requisition from the Unemployment Compensation Trust Fund necessary amounts from time to time'. The Alabama Unemployment Compensation Commission, by resolution adopted at a regular meeting held in the Commission's offices on December 6, 1937, nominated, appointed and constituted M. H. Harper, Chairman of the Unemployment Compensation Commission, as the person over whose signature requisitions are to be made in the name of the Alabama Unemployment Compensation Commission, and drawn on the Secretary of the Treasury of the United States Government for such amounts as may be necessary from time to time to adequately pay benefits.

"A copy of the resolution adopted by the Commission is herewith attached. I respectfully request your opinion as to whether M. H. Harper, Chairman, has duly constituted authority under the laws of the State of Alabama, and under the resolution of this Commission to sign requisitions, drawn on the Secretary of the Treasury of the United States, for

such amounts as the Commission may need from time to time to pay benefits."

You enclose copies of correspondence from the Commissioner of Accounts and Deposits in Washington, D. C., which set out in substance the procedure necessary to comply with Section 907(f) of the Social Security Act in order that the states may withdraw funds for the purpose of paying benefit claims arising under said state laws. You further enclose the following resolution made and adopted by the Unemployment Compensation Commission under date of December 6, 1937:

"Associate Commissioner Lipscomb introduced the following resolution and moved the adoption of the same:

"WHEREAS the Social Security Board has advised the Secretary of the Treasury of the United States that following the specified waiting period beginning January 1, 1938, the Alabama Unemployment Compensation Commission will start to pay Unemployment Compensation benefits,

"AND WHEREAS the Secretary of the Treasury of the United States, on December 1, 1936, issued a circular letter with respect to the procedure to be followed in withdrawing funds from the Unemployment Trust Fund, and

"WHEREAS it appears from such instructions that the Alabama Unemployment Compensation Commission should authorize an individual over whose signature requisitions shall be made on the Secretary of the Treasury, and whereas such action is also contemplated by Section 3(d) of the Alabama Unemployment Compensation Act, in which it is set out 'the Commission shall requisition from the Unemployment Compensation Trust Fund necessary amounts from time to time',

"NOW THEREFORE BE IT RESOLVED that the Alabama Unemployment Compensation Commission hereby nominates, appoints and constitutes M. H. Harper, Chairman of the Unemployment Compensation Commission, as the person over whose signature requisitions are to be made in the name of the Alabama Unemployment Compensation Commission and drawn on the Secretary of the Treasury of the United States Government for such amounts as may be necessary from time to time to adequately pay benefits.

"Associate Commissioner Brown seconded the motion to adopt the above resolution, and the said resolution was thereupon unanimously adopted by the Commission."

In reply, I wish to advise you that in my opinion the Chairman of the Alabama Unemployment Compensation Commission is, by virtue of the attached resolution and under authority granted in the Alabama Unemployment Compensation Act, the duly constituted authority under the laws of the State of Alabama to sign requisitions drawn on the Secretary of the Treasury of the United States for such amounts as the Commission may need from time to time to pay benefits. I call your attention to Section 3(b) of the Alabama Unemployment Compensation Act, as amended (Acts 1935, page 950, as amended), which provides as follows:

"(b) Withdrawals. The fund shall be administered in trust and used solely to pay benefits, upon vouchers drawn on the fund by the commission pursuant to general commission rules and no other disbursement shall be made therefrom. Such rules shall be governed by and consistent with any applicable constitutional requirements, but the

procedure prescribed by such rules shall be deemed to satisfy (and shall be in lieu of) any and all statutory requirements (for specific appropriation or other formal release by state officers of state moneys prior to their expenditure) which might otherwise be applicable to withdrawals from the fund."

I wish to further call your attention to Section 3(d) of the Alabama Unemployment Compensation Act, *supra*, which provides as follows:

"(d) Deposit. All contributions paid under this Act shall upon collection be deposited in or invested in the obligations of the 'Unemployment Trust Fund' of the United States Government or its authorized agent, so long as said trust fund exists, notwithstanding any other statutory provision to the contrary. The Commission shall requisition from the Unemployment Trust Fund necessary amounts from time to time."

In my judgment, sufficient authority for adoption of the resolution quoted *supra*, is found in Section 3(b), when taken and construed with Section 3(d) of the Act, quoted *supra*.

Premises considered, it is therefore my opinion that requisitions upon the United States Treasury for such amounts as may be necessary to pay benefits, shall be signed by the Chairman of the Alabama Unemployment Compensation Commission. It is my opinion that the said Chairman of the Alabama Unemployment Compensation Commission is vested with full authority to draw said funds in the name of the said Alabama Unemployment Compensation Commission.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 6, 1938

Hon. M. H. Harper, Chairman,
Unemployment Compensation Commission,
Montgomery, Alabama.

Unemployment Compensation Commission—Benefits—Eligibility—
Held employees unemployed prior to January 1, 1938, as well as employees becoming unemployed after January 1, 1938, all of whom have met the requirements of law, entitled to benefit as provided for by the Unemployment Compensation Law.

Opinion by Assistant Attorney General Small.

Dear Sir:

In reply to your request for an official opinion of this office which is as follows:

"I respectfully request your opinion as to whether or not workers who are out of employment prior to January 1, 1938, who remain unemployed thereafter, and who have accumulated wage credits under the Unemployment Compensation Act, are entitled to receive benefits after January 1, 1938. Stated in another manner, must an employee become unemployed after January 1, 1938, in order to be eligible for benefits under the Alabama Unemployment Compensation Act."

I wish to advise that in my judgment, your inquiry should be answered in the negative. I wish to refer you to the Alabama Unemployment Compensation Act, Acts of 1935, page 950, as amended by the Acts, Extra Session, 1936-1937, page 217, which provides in part as follows:

"An employee shall be deemed eligible for benefits for a given week of his unemployment only if he has within the first three of the last four completed calendar quarters immediately preceding the first day of his benefit year earned wages for employment by employers equal to not less than sixteen times his weekly benefit amount."

In my judgment, Section 6(a) quoted above must be construed in conjunction with Section 5(a) prescribing payments of benefits. Said Section 5(a) provides in part as follows:

" * * * after contributions have been due under this act for two years, benefits shall become payable from the fund to any employee who thereafter is or becomes unemployed and eligible for benefits."

You will note that the words "any employee who thereafter is or becomes unemployed", (emphasis supplied), must necessarily include employees who become unemployed in 1937 and continue unemployed after January 1, 1938.

It is my opinion that the legislature intended that the benefit provisions of this law should become effective January 1, 1938, and that those persons then or thereafter unemployed who have within the first three out of the last four completed calendar quarters immediately preceding the first day of January, 1938, earned wages equal to not less than sixteen times their weekly benefit amounts; who have completed since January 1, 1938, a "waiting period" of unemployment as defined by law; who have registered for work; and who have met all the other requirements prerequisite to qualifying for benefits, shall, at the expiration of the required waiting period, be eligible for benefit payments.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 6, 1938

Hon. E. C. Godfrey,
Sheriff, Sumter County,
Livingston, Alabama.

The law recognizes no fractional parts of days. The day ends at midnight. Therefore, a bailiff of a court serving for any length of time before midnight and any length of time after midnight of any day would be entitled to two days' pay.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of December 13, 1937, in which you request my opinion as follows:

"Is a bailiff waiting on court entitled to two days pay when he is required to stay with the jury at night?"

A day means twenty-four hours beginning and ending at twelve o'clock midnight.—**Robertson v. State**, 43 Ala. 325.

The law recognizes no part of a day.—**Farmers Union Warehouse Company v. Barnett Bros.**, 22 Ala. App. 524. Therefore, it is my opinion if the bailiff goes on duty with the jury at five-thirty P. M., and is discharged after midnight of the next day, he would be entitled to two days' pay. On the other hand, if the bailiff went on duty with the jury at midnight of any day and remained until midnight the same day, he would be entitled only to one day's pay. In other words, midnight is the end of the day, and if the bailiff is on duty for any length of time before midnight, the law not recognizing parts of days, he would be entitled to pay for that day and if he stayed on duty until one o'clock A. M., of the second day he would be entitled to another day's pay.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 7, 1938

Hon. Sam Drinkard,
Tax Collector,
Marengo County,
Linden, Alabama.

The claim of a state witness in a criminal case that has been properly and duly registered or certified must be paid out of the fine and forfeiture fund where such witness certificates are a claim against the fine and forfeiture fund, in preference to all other claims of officers until there is a sufficient surplus in the fine and forfeiture fund to take care of all outstanding registered witness certificates; and claims or witness certificates in the hands of a third party duly registered are on the same basis with other witness claims as to this fund.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of November 10, 1937, in which you request my opinion as follows:

"Please render me an official opinion on the following facts:—

"When officers fees are registered against the fine and forfeiture fund of the county, are state witness claims which may be registered at any time before a surplus arises in this fund to pay said claims a preferred claim against said fund over officers claims registered regardless of date of registration of said claims?

"I registered, as Sheriff of Marengo County, certain claims against the fine and forfeiture fund of Marengo County in 1932 and later, are state witness certificates which are registered at this time a preferred claim over my claim which were registered as late as 1932 should a surplus have not arisen in said fund since the filing of my claims.

"Should state witness certificates which are not in the hands of the original owners be a preferred claim over officers fees registered against the fine and forfeiture fund regardless of the date of registration?

"I will thank you very much to give this matter your immediate attention."

It appears to me that all of your questions can be answered in one. You will note Section 4039, Code of Alabama, 1928 (Michie's) provides, among other things:

"Section 4039. Whenever there shall be a surplus of the fund arising from fines and forfeitures in the county treasury of any county, over and above the sum required to pay the registered claims of the state witnesses, the county treasurer of such county must pay the fees of the officers of the court arising from criminal cases in which the defendant is not convicted and the costs are not imposed on the prosecutor, or in which defendants have been convicted, and have been proved insolvent by the return of executions 'no property found' * * *"

It appears from the above that witness claims when registered become preferred above all other claims up and until there is a surplus arising in said fund and when this surplus does arise, then officers' claims are payable. But witness claims must be registered, if not, they are not clothed with this priority. *Stone v. Ames*, 91 Ala. 644, *Mims v. State*, 180 Ala. 511.

I do not think that the registration of officers' claims can ever make them prior claims against the fine and forfeiture fund of the county over witness claims without regard to the date of registration of such claim. Section 4039, *supra*, says: "Registered claims of witnesses" and does not say prior registered witness claims.

Therefore, it is my opinion that there must arise such a surplus above all registered witness claims without regard to the date of registration. I do not think it matters whether or not the witness claims are in the hands of a third party if they are duly registered. They come in against this fund as other registered witness claims.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

(THIS OPINION HAS BEEN OVERRULED)

January 7, 1938

Hon. Chas. W. Lee,
State Comptroller,
CAPITOL.

Taxation—When it is discovered, after payment, that Homestead Exemption Certificate is illegal or in error, the portion uncollected should be assessed as an escape tax, and collected as provided by Sections 45, 189, and 191, Revenue Act 1935, and not by tax sale.

Opinion by Assistant Attorney General Park.

Dear Sir:

I have your letter of September 13, 1937.

"When it is determined that the exemption accorded a taxpayer on a Homestead Exemption Certificate is illegal or in error after the payment of the tax on which the exemption applied, by what method is the tax to be recovered?"

"Can this portion of the tax be assessed as an escape?"

"Could the payment be considered a partial payment and the Tax Collector proceed to sell the property for the recovery of the unpaid balance?"

It is my opinion, when it is discovered after payment, that Homestead Exemption accorded a taxpayer is illegal or erroneous, the uncollected portion should be treated as an escape tax, and should be assessed and collected as provided in Sections 45, 189 and 191, Revenue Acts of 1935, which I now quote:

"Section 45. Whenever the Tax Assessor shall discover that any property has escaped taxation in any assessment within five years next preceding the current year, he shall list, return and value said property for assessment for the years during which same has escaped taxation, and shall also endorse on each such returns the year or years for which the property has escaped taxation, and the accrual of a penalty of ten per cent of the taxes assessed thereon for each year. The Tax Assessor shall give notice of such escape assessment by registered mail, return receipt demanded, to the owner or to the agent or attorney of such owner, notifying such person to appear before the Assessor in person, or by agent or attorney, within twenty days after such notice is given, if there be an objection to the assessment and notifying such person that if no objection is made said assessment will be made final on the twentieth day after the mailing of such notice of escape assessment. If on the date set for hearing such objection the person against whom the assessment is made fails to appear, or, if in the opinion of the Tax Assessor the assessment should not be changed and the assessment is proper, then the Tax Assessor shall make the assessment final. 'The property owner if he has filed objection to such assessment, may appeal from the assessment to the Circuit Court of the County in which the property is located within thirty days after such assessment becomes final, by giving notice in writing to the Tax Assessor and by filing a copy of such notice with the Clerk of the Circuit Court and giving bond to be approved by and filed with the Clerk of the Circuit Court to cover costs and thereafter such case shall be tried as other tax cases appealed to the Circuit Court from the Board of Review. The taxpayer or the State shall have the right to demand a trial by jury by filing a written demand therefor, within ten days (10) after the appeal is taken. Whenever any escape assessment is made final, the taxes shall immediately become due and the Assessor or Deputy Assessor shall forthwith certify the assessment to the Collector, who shall forthwith collect same unless at the time of taking the appeal the taxpayer has executed a supersedeas bond with sufficient sureties to be approved by the clerk of the Circuit Court in double the amount of the taxes, payable to the State of Alabama, conditioned to pay all taxes, interest and costs due the State, County or any agency or subdivision thereof.'" (Underscoring ours).

Section 189. It is the duty of the collector, when engaged in the collection of taxes for any year, if he discovers that any person or property within his county has not been assessed with the tax or taxes lawfully chargeable to such person or property for that year, or any preceding year, not more than five years before that time, forthwith to assess and collect the taxes due on the same, and in writing notify the assessor of the fact so discovered, in order that proper assessment of unassessed taxes may be made, and the collector has the same authority to administer oaths and propound questions as the assessor has, and any party failing or refusing to answer such questions, or to give in his property, shall be liable to the same penalties as provided in cases where parties fail or refuse to return their property to the assessor or answer

the questions required to be propounded by the assessor. In such assessments of escaped taxes, the taxpayer on giving notice to the tax collectors, shall have the right of appeal as provided for escaped assessments made by the tax assessor, and all provisions and conditions applying thereto shall apply as to escaped assessments made by the tax assessor." (Underscoring ours).

"Section 191. Whenever the collector assesses and collects any escaped taxes, he shall forthwith report the same to the tax assessor who shall enter such assessment in the back part of the book of assessments, and shall certify the amount collected and the items of property so assessed in the form of an abstract to the State Comptroller, and the State Tax Commission and the collector is chargeable with the same to the amount of taxes due the State and County, respectively."

It is my conclusion that Sections 45, 189 and 191, quoted above clearly answer your inquiry as to how the tax should be classified and provides proper procedure for collection.

Tax sale would not be the proper procedure to enforce collection inasmuch as Section 214, Revenue Acts of 1935, specifically set out that the probate Court is empowered to order the sale of lands when the tax collector shall report to the court that he is **unable to collect the taxes assessed against such lands**. It can be clearly seen in our case that there has been no assessment in regard to the portion covered by the Homestead Exemptions, nor is the Tax Collector in a position to report that he is unable to collect the taxes assessed against the land.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 7, 1938

Hon. C. E. McNatt, Clerk,
Circuit Court, Franklin County,
Russellville, Ala.

General Acts of 1936-1937, page 230, Section 2, relating to fines for violation of Act prohibiting driving while intoxicated.

1. Forfeitures in cases for violation of said Act are payable to funds of State Highway Department.

Opinion by Assistant Attorney General Flurry.

Dear Sir:

I have your request of September 20, 1937, as follows:

"Section 2 of the General Act of the Legislature of 1936-37, pages 229, 230 provides as follows:

"All fines collected for the violation of this Act shall be paid into the Highway Patrol Fund, as now provided by law."

"If a person executes an appearance bond on a charge of driving a motor vehicle upon a highway while intoxicated and forfeits the bond by failing to appear in court and the forfeiture is made final and collected, please advise me to whom I should pay the funds collected in the forfeiture case? Does the money collected in the forfeiture case go to the

fine and forfeiture fund of the county, to the state highway department or to the highway patrol fund?"

The Highway Code of 1927, General Acts 1927, page 365, prohibited any person driving any vehicle upon any highway within this state, while intoxicated, and assessed penalties for the violation thereof.

Said Acts, pages 390, 391, provided that "all fines and forfeitures collected upon conviction or upon forfeiture or bail of any person charged with the violation of any of the provisions of this article constituting a misdemeanor shall be within thirty days after such fine, or forfeiture is collected, forwarded to the state treasurer. All amounts received from such fines, or forfeitures shall be credited to the funds of the State Highway Department, for the maintenance of roads and bridges".

In 1935 the legislature passed the State Highway Patrol Act, General Acts of 1935, page 756. This Act does not treat the subject matter contained in Acts of 1927, page 365, relating to driving while intoxicated. The Highway Patrol Act provides authority for revoking the license of persons driving upon the highway while intoxicated. It further authorizes the state Highway Commission, with the approval of the Governor, to establish rules and regulations concerning the operation of motor vehicles upon the highways. This could not authorize the highway commission to supersede said provisions of the 1927 Act, with a regulation and thereby supersede the penalty provided for in the 1927 Act with the penalty provided for in cases of violation of regulations established by the Highway Commission.

The following is an excerpt from Section 8 of the Highway Patrol Act:

"The said moneys shall be kept in a separate fund in the state treasury to be known as the 'Highway Patrol Fund'. Fines and forfeitures imposed upon persons violating the provisions of this Act shall be rendered into the said Highway Patrol Fund by the officers of the several courts".

The above excerpt refers to fines and forfeitures arising out of violations of the provisions of the Highway Patrol Act, and no others. A prosecution for driving upon the highways of this state while intoxicated would be under and by virtue of the provisions contained in the Highway Code, General Acts 1927, page 365. Therefore, the fines and forfeitures arising out of said violations would be controlled as to their disposition by Acts 1927, pages 390-391, hereinabove quoted and would go to the funds of the State Highway Department instead of to the "Highway Patrol Fund".

The above sets out the status of said fines and forfeitures prior to the enactment by the legislature of the fund provisions contained in General and Local Acts, 1936, 1937, pages 229, 230. Said Act treats the subject of driving while intoxicated upon any highway of this state and prohibits the same and provides the penalties for violations thereof. It is almost identical with the language used in General Acts 1927, page 365. Section 1 of said Act is not repugnant to or inconsistent with the said provisions of the 1927 Act. However, it is an affirmative statute revising the entire subject matter of the Section of the 1927 Act, treating driving upon highways while intoxicated and above referred to. The legislature, no doubt, intended said Section 1 as a substitute for the 1927 Section.

Edison v. State, 134 Ala. 50, 32 So. 308.

State v. Kirkpatrick, 95 So. 490, 209 Ala. 96.

Section 3 of the 1936-37 Act reads:

"All laws or parts of laws in conflict herewith are expressly repealed."

Although there is no repugnancy in the said 1936-37 Act to the 1927 provision, it is my opinion that the 1936-37 Act repealed the provisions hereinbefore referred to in the 1927 Act, or Highway Code, by substituting therefore, the provisions contained in Section 1 of the 1936-37 Act.

Section 2 of the 1936-37 Act is as follows:

"All fines collected for the violation of this Act shall be paid into the Highway Patrol Fund, as now provided by law."

Said Section 2 does not refer to forfeitures, but is limited to fines. Thereunder all fines collected for violations of the 1936-37 Act should be paid into the Highway Patrol Fund, as provided in said Section 2. This is not controlling as to forfeitures. Fines are not the same as forfeitures. Each has its distinct legal meaning. This has been recognized by the legislature in many Acts. For example, Chapter 134, Sections 4038-4042, refers to fines and forfeitures, and recognizes that the two are separate and distinct funds. The provisions of the 1927 Act, Highway Code, refer to the collection of fines and forfeitures collected upon conviction or upon forfeiture of bail. The Highway Patrol Act also refers to fines and forfeitures. There is a clear legislative intent to include in said instances funds received from fines upon conviction and also funds received from forfeiture of bail. This is not true under Section 2 of the said Act of 1936-37. Forfeitures collected for the violation of said Act do not go to the Highway Patrol Fund.

It is my opinion that funds received from forfeitures in the Circuit Court upon charges of violating Section 1 of said Act of 1936-37, should be credited to the funds of the State Highway Department to be used in accordance with the provisions of the Section of the Highway Code, Acts of 1927, page 390, 391. Said Section 1 replaces or is substituted for the former provisions of law with reference to driving upon any highway of this state while intoxicated, as above expressed. This being true the provision with reference to the disposition of forfeitures by the 1927 Act, remain applicable to the violations of said Section 1, 1936-37 Act, in respect to driving any motor vehicle upon any highway of this state, while intoxicated.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 7, 1938

Hon. Henry S. Long, Chairman,
The State Tax Commission,
Montgomery, Alabama.

1. Homestead exemption from taxes—Property leased to another prior to October 1, 1936, cannot be claimed as exempt from taxes for tax year 1936-37.

2. Claim of homestead filed pursuant to Article 2, Chapter 292 of the Code of 1923, is not conclusive as to status of homestead, but may be considered along with other evidence to determine status of property.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of November 30th, in which you request my opinion as follows:

"The following questions have been presented in regard to the allowance of exemptions under the provisions of Act No. 107, General Acts 1936-1937, page 113.

"The owner of a house and lot in a city or town formerly occupied the property as a homestead. Prior to October 1st, 1936, the owner thereof moved away from the county in which the property is located (in some cases moved away from the State). Prior to October 1st, 1936, the owner rented or leased the property to another and placed the renter or lessee in peaceable possession thereof under the terms of a rental or lease contract whereby the renter or lessee may remain in possession of the property for as long as twelve months or more. Under the terms of the rental contract the owner of the property cannot repossess the property nor can he occupy it as a homestead during the life of the lease or rental contract, except upon default of the lessee.

"1. Can the owner of such property obtain exemption from State taxes within the limits of the law for the tax year commencing October 1st, 1936, or for any tax year during which the property is occupied by another during the conditions above stated?

"2. Does the filing of a declaration of claim in the probate office as provided by Article 2, Chapter 292 of the Code of 1923 affect the status of the property described above, insofar as the exemption under Act No. 107 is concerned?

"3. If the filing of a claim in the probate office in accordance with Article 2, Chapter 292, above, affects the status of the property for taxation, when should the claim be filed?

"4. Can it be filed after the expiration of the assessing period in which the property is sought to be taxed or must it be filed before the lien for taxes attaches, that is to say, before October 1st of the tax year?

"5. Is there not a distinction between the liability of property for assessment of taxes and the liability of property to sale for the payment of debts in that the liability for assessment or exemption from taxes is recurrent annually and the liability for sale or exemption from sale for debt is a matter dependent upon the duration of ownership?"

Your letter requests my opinion on propositions as to which there have arisen differences of opinion. For this reason, and to prevent possible misconstruction of this opinion, as well as of previous opinions, I feel it advisable to give a short resume of decisions of the Supreme Court and of previous opinions of this office which may be pertinent.

As you know, the act providing for the exemption of homesteads from taxes (Acts of 1936-37, page 113) provides:

"The word 'homestead' as herein used is the 'homestead' as now defined by the constitution and laws of the State of Alabama."

Homestead is defined by the Constitution of 1901, in Section 205, which provides:

"Every homestead, not exceeding 80 acres, and the dwelling and appurtenances thereon, to be selected by the owner thereof, and not in any town, city, or village, or in lieu thereof, at the option of the owner, any lot in the city, town, or village, with the dwelling and appurtenances thereon, **owned and occupied by any resident of this state**, and not exceeding the value of two thousand dollars, shall be exempt" etc.

This definition of a homestead has been construed by the Supreme Court in the case of **Miller v. Marx**, 55 Ala. 322, where it was held that under this Section the Legislature might increase the area of the homestead, but could not diminish it. Sections 206 and 208 of the Constitution also provide for certain homestead exemptions, but in neither section is a homestead defined.

The statutes of Alabama with reference to homestead and other exemptions are contained in Chapter 292 of the Code of 1923. Article 1, thereof (Code Sec. 7882-7889) provides for certain exemptions from levy and sale under process. Section 7882 provides for an exemption of homesteads from levy and sale under process and defines a homestead as follows:

"The homestead of every resident of this state, with the improvements and appurtenances, not exceeding in value two thousand dollars, and in area one hundred and sixty acres, shall be, to the extent of any interest he may have therein, whether a fee or less estate, or whether held in common or in severalty, exempt from levy and sale under execution or other process for the collection of debts during his life and **occupancy**, and if he leave surviving him a widow and a minor child, or children, or either, during the life of the widow and minority of the child or children; but the area of the homestead shall not be enlarged by reason of any encumbrance thereon, or of the character of the estate or interest owned therein by him."

Article 2, Chapter 292 (Code Sections 7890 to 7917) provide for the claim and contest of exemption.

Article 3 (Code Sections 7918-7926) provides for the exemption from administration and payment of debts of a decedent. Section 7918 contained in said Article 3 provides:

"7918. The homestead of any resident of this state, leaving surviving him at his death a widow and minor child or children, or either, with the improvements and appurtenances not exceeding in value two thousand dollars, and in area one hundred and sixty acres, shall be exempt from administration and the payment of debts in favor of such widow and minor children" etc.

There are contained in Articles 1, 2 and 3 of Chapter 292 numerous administrative and procedural provisions affecting the claim and contest of claim of homestead exemptions. Among these provisions is contained Section 7890, which provides for the filing of a declaration of claim of homestead or other exemption from levy and sale under process. This section has been held not to be applicable where selection is not necessary. **Alley v. Daniel**, 75 Ala. 403-406. Under the provisions of Section 7892 the filing of such claim of exemption shall be taken and considered as **prima facie** correct and under Section 7894 where the declaration is filed for record the property therein described is not subject to levy unless it is successfully contested as provided by Section 7895, et seq.

Section 7914 provides:

"When a declaration of claim to a homestead exemption has been filed in the office of the judge of probate, leaving the homestead temporarily, or a leasing of the same, shall not operate an abandonment thereof, or render it subject to levy and sale; but the right thereto shall remain the same as if the actual occupancy thereof had continued."

Article 3, with reference to the exemption of homestead from administration and payment of debts, also contains procedural statutes providing for the setting apart of homesteads to widows and minor children. Section 7952 provides:

"When homestead exemption has been allotted to the widow and minor child or children, or either, under any of the provisions of this Chapter, they shall not be held to have abandoned or forfeited the same by a removal therefrom."

I have set out the purport of most of these sections to show the impracticability of adopting all of them as applicable to the claim of exemption from taxes. You will note that the Act of 1936-37, page 113, above referred to, does not make applicable to claim of exemption from taxes all of the statutes with reference to claim of homestead exemptions from levy and sale or from administration and payment of debts. It merely adopts the definition of "homestead" as given by the previous statutes defining such "homestead". It is my opinion that the administrative and procedural statutes, as contradistinguished from those definitive of the word "homestead" are not adopted by the taxation exemption statute. This conclusion is strengthened by Section 7917, which draws a distinction between the right and the mode or remedy for asserting the homestead right. This section is as follows:

"7917. The right of homestead or other exemption shall be governed by the law of force when the debt or demand was created; but the mode or remedy for asserting, ascertaining, contesting, and determining claims thereto shall be as prescribed in this chapter."

It is also strengthened by the decision of the Supreme Court in *Sewell v. Sewell*, 156 Ala. 619, where the Supreme Court in a claim of widow's homestead exemption held that Section 2065 of the Code of 1896, which is now Section 7914 of the Code of 1927, "relates exclusively to homestead exemption against levy and sale under process" and has no application to a claim of homestead exemption from administration and payment of debts. Following such decision, the conclusion must be reached that the procedure for asserting homestead exemption from levy and sale under process as set out in Articles 1 and 2 of Chapter 292, and the procedure for claiming homestead exemption from administration and payment of debts as set out in Article 3 of Chapter 292, are not applicable to the claim of homestead exemption from taxes.

This is further supported by the fact that the Legislature has already provided the mode of claiming homestead exemption from taxes by requiring that such homesteads be listed separately on the return for tax assessment. See Acts of 1936, Special Session, page 4.

Having determined this and before proceeding to a consideration of the direct questions asked in your letter I feel it advisable to set out the pertinent prior opinions of this office. It has been decided by this office that the right of exemption is to be determined by the status as of the time of assessment, that is, October 1, 1936, as to 1937 taxes. Quarterly Reports Vol. 8, page 62; Quarterly Reports Vol. 8, page 66-G; Quarterly Reports Vol. 8, page 267; opinion to J. W. Hamilton of Dec. 1, 1937.

It has also been held that a person cannot select a homestead out of land not occupied. Quarterly Reports Vol. 8, page 97.

"Act No. 107, General Acts of 1936-37, p. 113, which authorizes exemption of homesteads from the payment of State taxes, defines a homestead as that which is defined by the Constitution and laws of Alabama.

"The laws of Alabama require actual occupancy of property as a necessary incident to a homestead. The Courts have construed actual occupancy as existing when disconnected tracts are farmed in connection with each other and for the common support of the family. *Dicus v.*

Hall, 3 So. 239, 83 Ala. 159. See opinion of this office to Hon. T. D. Woodham, Tax Assessor, Dale County, Ozark, Alabama, dated the 10th day of August, 1937. **Actual occupancy, except in cases of temporary absence, is essential to constitution and retention of homestead in Alabama. Hodges v. Hodges**, 77 So. 741, 201 Ala. 215." (Emphasis ours).

To the same effect see the opinion of this office to the Hon. B. M. Davis of November 2, 1937, where it was stated:

"A Homestead must be the place of actual residence.

"**McConnaughy v. Baxter**, 55 Ala. 379;

David's Adm'r v. David, 56 Ala. 49;

Preiss v. Campbell, 59 Ala. 635;

Waugh v. Montgomery, 67 Ala. 573.

"The case of **Wildman v. Means**, 94 So. 823, 208 Ala. 487, holds that: 'Where the mortgagor of a U. S. homestead entry land maintained his home on the place where his wife lived, but not on the homestead entry mortgaged, but he satisfied the requirements of the laws of the U. S. by having his mother and sisters live on it, his homestead entry land was not his homestead within Constitution 1901, Section 205, of the Laws of the State.'"

The question of the right of claimant to an exemption where there was an absence or a claimed abandonment was treated in **Quarterly Reports Vol. 8**, page 57; **Quarterly Reports Vol. 8**, page 268; **Quarterly Reports Vol. 8**, page 317. In the latter opinion it was ruled that the intent to make the property the permanent home would govern. In **Quarterly Reports Vol. 8**, page 268 it was held that abandonment of homestead was a question of fact and that "the surrounding circumstances and the *bona fide* intent of the taxpayer must be considered." In **Quarterly Reports Vol. 8**, page 57 it was also held that abandonment, leaving a gratuitous occupant in possession of the property was a question of fact to be determined from the intention of the owner. I therefore quoted from the case of **Fuller v. American Supply Co.**, 185 Ala. 512, and I again refer you to this quotation.

In two opinions reported in **Quarterly Reports Vol. 8**, page 88 and page 268 I held that the rental of a portion of the premises did not deprive the property of its character as a homestead. In those opinions the owner actually occupied the balance of the property.

A very similar question was presented in the opinion in **Quarterly Reports Vol. 8**, page 118. In that case the owner apparently rented out the entire home, but reserved to herself certain rooms in the house, in which she kept her furniture and which she actually occupied during several months of the year. She was, therefore, entitled to and actually did occupy a portion of the premises and the facts were, therefore, similar to the facts presented for my consideration in the opinions reported at pages 88 and 268.

Citing the case of **Fuller v. American Supply Co.**, at 185 Ala. 512, I reached the same conclusion as the previous opinions, that the exemptioner was entitled to exemption. In support thereof, I also cited Section 7914 of the Code. The same conclusion is reached without giving effect to Section 7914.

None of these opinions is determinative of the questions here presented. I, therefore, proceed to a consideration of the questions and decide the same on the facts set out in your letter.

1. According to these facts, the owner in question did not occupy the property on October 1, 1936, but prior to that date rented the property to another who had the possession and the right to possess for 12 months or more. Since the owner did not occupy the premises on October 1, 1936, the determinative date, the property does not come within the definition of a homestead as defined by the Constitution and laws of the State of Alabama, set out above, unless the definition is to be changed by Code Section 7914. In my opinion, this Section 7914 does not change the definition of homestead so that property not occupied, but leased to another, may be claimed as exempt from taxes. In my opinion, this Code Section 7914 permitting the lease of a homestead is restricted in effect to exemption from levy and sale under process and should not be extended so as to affect a right of exemption from state taxes. In reaching this conclusion I have borne in mind the fact that exemptions from taxation must be strictly construed against such exemptioner and in favor of the taxing authorities. **Elba Bank & Trust v. State**, 91 So. 991.

In answer to your first question, therefore, I advise you that, in my opinion the owner of such property on the facts set out in your letter cannot obtain exemption from state taxes during the tax year commencing October 1, 1936. It is further my opinion that he cannot obtain exemption for any tax year during which the property is occupied by another under a valid lease.

2. I believe I have already answered your second question above. In my opinion, the filing of a declaration of claim as provided by Article 2, Chapter 292, of the Code of 1923, providing the mode and remedy of obtaining exemption from levy and sale under process does not affect the status of the property or the rights to exemption from taxation. It is merely evidence which may be considered by the tax assessor.

3 and 4. Having reached this conclusion there is no necessity for answering questions numbered 3 and 4.

5. In my opinion, there is a distinction between the liability of property for assessment of taxes, and the liability of property to sale for the payment of debts. Stated another way, there is a distinction between the right of exemption from taxes and the right of exemption from levy and sale under process or right of exemption from administration and payment of debts. The Legislature has provided in Article 2 of Chapter 292, for certain procedure under which a claim for exemption from levy and sale under process may be made. This right of exemption from levy and sale is determinable at the time when the execution lien attaches. Any event subsequently occurring would not operate to support or defeat the right of exemption. **McCrary v. Chase & Co.**, 71 Ala. 540; **Hines v. Duncan**, 79 Ala. 112; **Block v. George**, 84 Ala. 178.

The filing of the declaration provided by Section 7914 is *prima facie* evidence of an intention to return and the status of the domicile as a homestead is presumed to continue until a change *facto et animo* is shown. **Caldwell v. Pollak**, 91 Ala. 353-355, 80 So. 546-547; **Powers Clothing Co. v. Smith**, 202 Ala. 634, 81 So. 576. These cases, however, in my opinion, have no effect upon the claim for homestead exemption under the law requiring the assessment of such property for the right to homestead must be determined as of October 1 of each successive year. It is the duty of the tax assessor to determine at that time the status of the property as a homestead. He is entitled to take into consideration any claim of homestead filed in the Probate Court or any decree of the Probate Court allotting the same as a homestead, but this should be considered along with all other evidence. If, upon considering such evidence, it appears that the person claiming such home-

stead is not entitled to occupancy as of October 1, then such exemption as a homestead should be denied.

Compare opinion in Quarterly Reports Vol. 8, page 285, holding that if the person claiming the homestead is not in actual or constructive occupancy thereof he would not be entitled to claim the property as a homestead. Compare also the opinion in Quarterly Reports Vol. 8, page 286, holding that it is not necessary to file a claim for homestead exemption under Code Sections 7890-7894 in order to secure the benefits of the exemption from taxes, but such claim filed in order to secure exemption from levy and sale under process would be merely evidence to be considered by the assessor in determining whether such property is a homestead.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 7, 1938

Hon. J. C. Kellett,
Judge of Probate,
DeKalb County,
Fort Payne, Alabama.

License tax: Schedule 96 of Section 348 of Act No. 194, approved July 10, 1935, General Acts 1935, pages 256, 482, requires a moving picture company operating two movie houses to obtain a license for each picture house.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of October 20, 1937, requesting my opinion as follows:

"There are at present two motion picture shows in operation in Fort Payne, namely: The DeKalb Theatre and The Strand Theatre. Both shows are owned and operated by a corporation, The DeKalb Amusement Company, Incorporated.

"Schedule No. 96: 'Every person engaged or continuing in the business of operating a moving picture show or show of like character to which admission is charged:' etc.

"DeKalb Amusement Company raised the issue that under the terms of this schedule they should be allowed to operate both shows on one license. The shows are operated contemporaneously. I will thank you to give me an opinion as to whether they should buy license for each show or they could, under the law, operate both shows on one license."

Answering your inquiry as to whether the DeKalb Amusement Company, under the provisions of Section 96 of license schedule as contained in General Acts of the Legislature, Regular Session 1935, page 482, should procure license for each of two theatres, the DeKalb Theatre and the Strand Theatre, which are operated in separate houses or places in the City of Fort Payne, Alabama, or should be permitted to operate both of the same under one license, you are advised that, in my opinion, a separate license should be procured for each of said theatres, or motion picture shows.

Section 354 of the Revenue Act of 1935 (Simon's Revenue Laws of Alabama, pages 446-447) provides:

"Section 354. Every license granting authority to engage in or exercise any business, employment or profession, unless expressly authorized elsewhere or otherwise, shall designate the place of such business, employment or profession at some specified house or other definite place within the county of the Probate Judge granting it. Engaging in or exercising any such license, business, employment, or profession elsewhere than at such house or definite place, unless expressly authorized elsewhere or otherwise by law, shall be held to be without license. A license which does not specify such house or definite place where business, employment or profession is limited thereto by law, shall be void."

In the case of *Jebeles et al. v. State*, 117 Ala. 174, 23 So. 676, the question under consideration by the Supreme Court of Alabama was whether or not a person engaging in the business of selling cigarettes at two separate and distinct places in the City of Anniston should be required to procure license for that purpose for each of said places of business; and, in said case, the Supreme Court, speaking through Mr. Justice Haralson, said:

"It seems very clear that under this license, the appellants could not carry on the business authorized in more than one place in the City. If so, the purpose of the statute, which was to raise revenue,—and, in so far as it gives the better supervision over the dealers by police authorities,—might be largely defeated. If they might sell in two places as claimed, they might sell in an indefinite number of places. In analogous cases of dealers in intoxicating liquors, licensed to sell in a given town, it has been held, that they cannot carry on the business at more than one place. *State v. Walker*, 16 Me. 241; *State v. Gerhardt*, 48 N. C. 178; 11 Am. & Eng. Law, 644, 645."

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 10, 1938

Hon. Watkins M. Vaughan,
Judge of Probate,
Dallas County,
Selma, Alabama.

Dear Sir:

I beg to acknowledge receipt of your letter of January 10, 1938, as follows:

"Dallas County has recently completed a new jail. The jail covers much floor space and requires constant attention in the matter of maintenance and sanitation.

"I beg to call your attention to Section 4878 of the Code, which provides as follows:

"Expense of maintenance, etc., how paid.—The expense incident to the construction, maintenance, sanitation, healthfulness and hygiene of each county jail, prison and almshouse in this state shall be paid out of the funds of the county in which such institution is located and of the town or city, if the institution be a town or city institution'.

"It appears that under the section just quoted the county governing body has authority to employ such persons as may be necessary to maintain the jail and keep the jail in a sanitary condition. Please advise me

whether under the section just quoted the county governing body of Dallas County has authority to employ such persons as in its judgment may be required to maintain the jail and to keep the jail in a sanitary condition."

Section 4878 of the Code provides as follows:

"Expense of maintenance, etc., how paid.—The expense incident to the construction, maintenance, sanitation, healthfulness and hygiene of each county jail, prison and almshouse in this state shall be paid out of the funds of the county in which such institution is located and of the town or city, if the institution be a town or city institution."

Section 4878 undoubtedly places in the county governing body the authority to employ such persons as in the judgment of the county governing body may be necessary to maintain the jail and to keep the jail in a sanitary and healthful condition. Section 4878 places on the county governing body the duty to maintain the jail and to keep the jail in a sanitary and healthful condition. It is my judgment that your county governing body has authority under the section just quoted to expend such amounts of money as in its judgment seems proper and fit, to the end that the jail may be properly maintained and kept in a sanitary and healthful condition.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 13, 1938

Hon. Gaston Scott, President,
State Highway Commission,
Montgomery, Alabama.

Highways—NRM 57-C, Jefferson County—Bessemer Boulevard.

Dedication to public use of property owned in fee simple by Birmingham Railway, Light and Power Company upon which it maintains tracks, would not render said company liable under charter for paving or revising its tracks in said area.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

This is to acknowledge your letter of December 13, 1937, which is as follows:

"The Bureau of Public Roads has requested this Department to secure an opinion of the Attorney General as to the obligation of the utility company for the work of moving street car tracks on the above project, (Re: NRM 57-C, Jefferson County-Bessemer Boulevard) subject to the agreed participation of federal funds in the cost of this work.

"Herewith enclosed is a complete file on the project, which the writer requests that you return upon rendering your opinion.

"The Highway Department wishes to know if the utility must pay for the work to be done in the street car track area from the facts contained in the attached file.

"Please give this matter your prompt attention as the Department wishes to have this project released."

From the file it appears that the Birmingham Railway, Light and Power Company owns in fee simple a certain unpaved area down the center of the Birmingham-Bessemer Boulevard, upon which it maintains street car tracks. The City of Birmingham has requested the company to dedicate said area to public use. The company is willing to do so without remuneration, provided it will not thereby be held liable for any paving or relaying of its tracks. The dedication of said property is desired because of the proposed improvement of the Birmingham-Bessemer Boulevard with state and federal funds.

You wish to know if, in the event of such dedication, Section 4 of the franchise of the Birmingham Railway, Light and Power Company will impose any liability upon said Company for the paving and revising of its tracks upon any part of the dedicated area. Section 4 provides in pertinent part as follows:

"If the Mayor and Alderman have graded, improved, paved or macadamized or shall hereafter determine to grade, improve, pave or macadamize any of said streets or avenues over which said lines are operated with chert or gravel or any substance other than chert or gravel, then said party of the second part shall upon notice from the Mayor and Aldermen or city engineer, pave or improve, as the case may be, said tracks and between the rails of said tracks, and for the space of eighteen inches on each side thereof, and the space between the two tracks * * * ."

The above provision, in my opinion, refers only to tracks laid, by virtue of a franchise, on property owned by the city. By the very nature of the provision it could not apply to tracks laid on property owned in fee simple by the Company. Therefore, under the present state of facts the City of Birmingham is without authority to force the power company to pave the space between its tracks and extending eighteen inches on each side thereof, or to revise its tracks in the undedicated area owned by the Company.

Dedication of said area to public use would not necessarily render the Company liable for the work in question, although it would vest title in the City of Birmingham.—*State ex rel. Attorney General, v. Louisville & N. R. R. Co. et al.* 158 Ala. 208, 48 So. 208.

The Company, in making the dedication, should stipulate that as a consideration for such dedication the City of Birmingham will relieve it of all possible liability for paving or relaying tracks on the property in question. In that event there can be no question of liability.—*City of Birmingham v. Graham*, 202 Ala. 202, 79 So. 574.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 14, 1938

Board of Revenue,
Barbour County,
Eufaula, Alabama.

Notaries Public—

Bonds of commercial Notaries Public should be approved by Judge of Probate, and not by the county governing body.

Opinion by Assistant Attorney General Rowe.

Gentlemen:

I have your request for opinion over the signature of your counsel as follows:

"Section 9241 of the Code of 1923 provides that bonds with sureties to be approved by the Judge of Probate, shall be given by Notary Publics in Alabama.

"Our Judge of Probate construes the 'Baines Act'—approved April 20th, 1933—page 203—Acts of Extra Session of 1933 as requiring that Bonds of a Notary Public must be approved by the Board of Revenue, or Commissioners Court. He insists that Section 14 of this Act makes it mandatory for the Board to pass upon the bond, and approve the same.

"Our opinion is that the section merely fixes the amount of the bonds, and that the act was intended to require the Board to fix the amount of bond for such officials as handled money.

"We respectfully request an opinion from your office."

In my opinion, bonds of Notaries Public should be approved by the Probate Judge, under Section 9241 of the Code of 1923, notwithstanding Section 14 of the so-called Baines Act, Acts, Extra Session, 1933, page 203.

Strictly speaking, commercial Notaries Public are not county officers, and it was not the purpose and intention of the Bains Act, supra, to authorize approval of bonds of other than county officers by the county governing body.

Yours very truly,
A. A. CARMICHAEL,
Attorney General

January 17, 1938

Hon. M. E. Pritchett,
Tax Assessor,
Marengo County,
Linden, Alabama.

Taxation—Homestead—Act No. 107, Acts 1936-37, page 113.

Vendee of real property occupied as a homestead cannot claim homestead exemption until he has assessed the exempt property in his own name.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry as follows:

"On November 4th, 1936, Mr. A. L. Null made two assessments to his mother, Mrs. A. D. Null. One covering house and lot in the City of Demopolis, Alabama, and the other farm property.

"Mrs. Null lives in Demopolis and has gotten homestead exemption on assessment of city property.

"Mr. Null bought the farm property from his mother about two years ago but continued to make the assessment in her name and now claims he is entitled to homestead exemption on the farm property as he has lived on and cultivated same for a number of years.

"As stated above both assessments are in the name of Mrs. A. D. Null and one exemption certificate has been issued.

"Please advise if Mr. Null will be entitled to homestead exemption on the farm property."

It is my opinion that the vendee mentioned in your letter cannot claim homestead exemption of the property until he has lawfully assessed it in his own name.

The vendee should return the property for taxation. General Revenue Acts of Alabama, 1935, Section 31, as amended Special Session of the Legislature, 1936, page 4. An assessment in the name of the vendor is not lawful. **State v. White Furniture Co.**, 206 Ala. 575, 97 So. 896. Therefore, the property cannot be lawfully sold for taxes until there has been a valid assessment. A sale under an invalid assessment would not lawfully jeopardize possession. A homestead exemption presupposes a valid assessment of the property occupied as a homestead; otherwise there would be no lawful jeopardy of possession by a sale for payment of state taxes. The homestead exemption seeks to protect title and possession against sale and disturbance for payment of state taxes.

In an opinion to Hon. Charles W. Lee, August 10, 1937, Quarterly Report of the Attorney General, Vol. VIII, page 64, there is contained the following statement: "The exemption should be allowed irrespective of the person to whom the property is assessed." This statement is withdrawn. It was not pertinent to the inquiry.

Yours very truly,

A. A. CARMICHAEL,
Attorney General

January 18, 1938

Hon. J. H. Sims,
Judge of Probate,
Bullock County,
Union Springs, Alabama.

Counties—Deputy Solicitor of Bullock County cannot receive compensation for services rendered to the county but may receive actual expenses incurred in connection therewith.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of December 29, 1937, which is as follows:

"On March 12, 1936, W. E. McNair, Judge of Probate of Bullock County, Alabama, attempted to enter into a contract with the Southeastern Construction Company for the surfacing of the Union Springs-Montgomery Highway. This so-called contract was declared to be null and void by your opinion rendered upon the request of the Deputy Solicitor of Bullock County, Alabama, made on April 12, 1937. After the contract was declared to be null and void the Court of County Commissioners employed the Deputy Solicitor to represent it in the capacity of Attorney to advertise for bids for the surfacing of the said road, to work out with the Highway Department the specifications to be placed in the advertisement for bids, and all other things necessary toward making and entering into a contract with some construction company according to law. Later a contract was made and entered into, according to law, for the surfacing of this road with the Couch Construction Company and it developed that the county had saved approximately \$10,000.00.

"After the work was completed by the Couch Construction Company, the Court of County Commissioners then called upon the Deputy Solicitor of Bullock County, to draft warrants to be paid from the gasoline fund in the sum of \$30,000.00, with which to pay the Couch Construction Company for the surfacing of said road. In performing this work for the County, the Deputy Solicitor had to make several trips to Montgomery and Dothan, Alabama.

"After the work was completed by the Deputy Solicitor he was paid by the Court of County Commissioners the sum of \$350.00 to cover his expenses in the matter and to compensate him for his loss of time while out of his office in an effort to perform the work in this matter.

"Please advise me whether or not the above payment to the Deputy Solicitor was a legal expenditure of money."

In answer to your inquiry, I am of the opinion that the Deputy Solicitor in question cannot receive compensation for his services rendered the county under the contract, but may receive actual expenses incurred in connection therewith.

Section 5024, Code of 1923, as amended by Acts of 1936-37, p. 225, is as follows:

"Section 5024. COUNTY OFFICERS INTERESTED IN COUNTY CONTRACTS, OR HIRE OF COUNTY CONVICTS.—Any judge of probate, tax collector, tax assessor, sheriff, clerk of the circuit court, solicitor, or county treasurer, members of the court of county commissioners or board of revenue, or any other state or county officer who takes any contract, for work or services of the county, or is employed in any way under such contract, or is interested in any contract for hire of county convicts, or sells any goods or supplies to the county, or is in any wise pecuniarily interested in any such contract or sale, as principal or agent, must, on conviction, be fined not less than fifty nor more than one thousand dollars, and may be imprisoned in the county jail, or sentenced to hard labor for the County for not exceeding twelve months; but nothing in this section shall apply to the sale or purchase of drugs or medicine for the use of prisoners or paupers; but this section shall not be construed to prevent the Court of County Commissioners, Board of Revenue, County Commission or other governing body of the County from employing as attorney to such governing body an attorney who holds an office which does not

preclude him from practicing law and does not require his full time for which, **as such officer he is compensated on a per diem or fee basis**, nor shall it be construed to prevent the Treasurer in lieu of a County depository from being employed as clerk to the Court of County Commissioners, Board of Revenue, County Commission or other governing body of the County. Approved March 2, 1937." (*Italics supplied*).

It will be seen from the above that said section prohibits the solicitor from accepting employment for work or services for the county. (See opinion of Attorney General to the Judge of Probate, Tuscaloosa County, December 29, 1937). The exemption provided in the last part of said section regarding the employment of an attorney to the county governing body applies only to an attorney who holds an office and as such officer he is compensated on a per diem or fee basis. The deputy solicitor of Bullock County is paid on a salary basis under the provisions of Section 5522, Code of Alabama, 1923. **Opinion of the Attorney General to the State Comptroller, November 9, 1937.**

From the above it follows that the deputy solicitor of Bullock County cannot make a contract with the county and therefore cannot receive compensation therefor. However, if the deputy solicitor rendered services for the county in his capacity as deputy solicitor and incurred expenses in connection therewith, in my opinion, he should be reimbursed to the extent of his expenditure for actual expenses.

Yours very truly,
A. A. CARMICHAEL,
Attorney General

January 18, 1938

Hon. J. Russell Gibson,
Tax Assessor, Pike County,
Troy, Alabama.

Homestead Exemption—Act 107, Acts of 1936-37, page 113—Soldier.

A soldier in the United States Army who owns a farm occupied gratuitously by his mother, with whom he lives during his annual leave, is entitled to homestead exemption.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your request for opinion as follows:

"A soldier in the Regular Army owns a farm in this County and his Mother lives on same. He comes home during each year and lives on the place. Is he entitled to the Homestead Exemptions?

"He comes home on furlough and stays part of the time on the place."

Your question should be answered affirmatively. The exemptioner should not be deprived of his exemption merely because of his absence as a soldier in the United States Army. The law of Alabama contemplates such absence as merely temporary. The legislature provided that no person should lose his residence by being absent from the State in the military service of the United States. Section 366, Code of Alabama of 1923.

The occupancy of the mother was not under a rental or lease agreement; otherwise, the exemptioner would have had to file a declaration in accordance with Section 7194, Code of Alabama of 1923, to establish a prima facie right to exemption.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 18, 1938

Hon. B. Cooper, Treasurer,
Marion County,
Hamilton, Alabama.

Where a defendant has been convicted and sentenced to serve in the county jail, and execution has been returned "no property found", the fees of state witnesses may be paid from the fine and forfeiture fund of the county when a proper certificate has been issued; and the fees of the officers may be paid from the fine and forfeiture fund when there is a surplus as set forth in Section 4039 of the Code of Alabama, 1923.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of October 23, 1937, in which you request my opinion as follows:

"I have another question that confronts me in the payment of some State Witnesses in a case that was tried convicted and given a 30 days jail sentence. Execution has been issued in these cases and returned no property found. Can I pay these witness certificates from the fine and forfeiture under the general laws of the State. Can the Clerk and Sheriff collect their cost in the same cases.

"I have been under the impression that when an execution was issued and returned no property found in a case that was convicted by the State and the State failed to pay the cost or did pay part of the cost that the balance of the cost could be taken against the fine and forfeiture fund."

Section 3763, Code of Alabama, 1923, provides that the fees of witnesses subpoenaed on the part of the state to appear before any court in which a criminal prosecution is pending must be taxed against the defendant if he is convicted, and if an execution is issued against him and returned "no property found," "such fees must be paid by the county in the manner specified in Section 3769."

Section 3769 makes it the duty of the Clerk to issue a certificate to each witness appearing on the part of the state under conditions set forth in Section 3763, (including the situation where defendant is convicted and execution returned "no property found") "which certificate is payable by the treasurer out of any fines and forfeitures in the county treasury."

The case of *Gray v. Abbott*, 130 Ala. 322, 30 So. 346, holds that after the issuance of the certificate as above set forth and after amounts received from the defendant have been credited in accordance with Code Section 3667, the

balance upon the certificate becomes at that time, and not until that time, a valid claim against the county.

In reference to the fees for officers, Section 4039, provides that whenever there is a surplus in the fine and forfeiture fund, the county treasurer must pay the fees of the officers of the courts arising in criminal cases where the defendant is convicted, and has been proved insolvent by the return of an execution "no property found."

I am therefore of the opinion that where a defendant has been convicted and sentenced to serve in the county jail, and execution has been returned "no property found," the fees of state witnesses may be paid from the fine and forfeiture fund of the county when a proper certificate has been issued and the fees of the officers may be paid from the fine and forfeiture fund when there is a surplus as set forth in Section 4039 of the Code of Alabama, 1923.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 21, 1938

Hon. L. H. Montgomery,
Judge of Probate,
Greene County,
Eutaw, Alabama.

Counties—Sinking fund of county cannot be invested in bonds of the Alabama Bridge Authority, Inc.

Opinion by assistant Attorney General Screws.

Dear Sir:

I have your letter of recent date which is as follows:

"Please give me your opinion on the following:

"Are Alabama Bridge Authority Bonds a legal investment for the sinking fund of a county?"

I am of the opinion that your inquiry should be answered in the negative.

In an opinion of this office rendered to the Judge of Probate of Randolph County on September 16, 1935, it was held that county sinking funds providing for the retirement of bonds must be invested in bonds of the United States of America or in bonds of the State of Alabama or bonds of any county of the State of Alabama or any municipal corporation of the State of Alabama or deposited in bank on interest.

The Alabama Bridge Authority, Inc., was created under the provisions of Act No. 366, H. B. 876, approved September 7, 1935, (General Acts 1935, p. 785). Under Section 8 of said Act the bonds of said corporation are specifically exempted from taxes of all kinds in the State of Alabama. This office has also held that said corporation is an agency of the State.—Quarterly Report of

Attorney General, Vol. 8, p. 311. However, the above does not in anywise make the bonds of the Alabama Bridge Authority, Inc., the bonds of the State of Alabama. Therefore, they would not come within the classes of bonds above enumerated in which the sinking fund of the county may be invested.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 21, 1938

Hon. J. W. Tidmore,
Member, House of Representatives,
Hale County,
Moundville, Alabama.

Elections—Member, House of Representatives—

1. Under facts stated, position now occupied by J. W. Tidmore, as a member of the House of Representatives from Hale County, shall be designated as Place No. 1 in the coming primary elections for members of the House of Representatives from Hale County, since J. W. Tidmore is the senior incumbent. Section 16 A, Act No. 56, General Acts 1931, page 73, approved February 25, 1931.

2. In such a case, present incumbents may qualify as candidates for nomination or election to the place or places which they now hold or for other or different places.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of January 20, 1938, which follows:

"In 1934, I was elected to the Legislature from Hale County, Alabama, after qualifying in the Democratic Primary held in the Spring of 1934 for place No. 2 from said county. Hon. A. M. Tunstall was elected to place No. 1.

"After Mr. Tunstall had entered upon his duties as a member of the Legislature he died, and Mr. Hill A. Terry was elected as member of the Legislature from Hale County.

"I now intend to enter the Democratic Primary in May, 1938, and I desire an opinion from you on the following questions:

"1. Is the place which I now occupy as a member of the present Legislature, No. 1 or No. 2, taking into consideration Mr. Tunstall's death and the election of Mr. Terry?

"2. Is there any reason why I must seek in the 1938 Primary the same place which I now hold?"

In my opinion, under the facts set forth by you in your letter of inquiry, and in accordance with the provisions of Section 16 A of Act No. 56, General Acts 1931, page 73, approved February 25, 1931, the place which you now occupy as a member of the House of Representatives from Hale County, Hale County having two such members, shall be designated as Place No. 1 in the forthcoming primary elections for members of the House of Representatives from Hale County.

Section 16 A, supra, reads as follows:

"Section 16 A.—Whenever and wherever two or more State Officers of the same name are to be nominated in said primary each of said places to be filled shall be designated by number, and each candidate for such offices in the announcement of his candidacy shall designate the number of the office for which he is a candidate; that the same person shall not be a candidate or permitted to file his declaration for more than one of such places; provided, no ballot shall be counted for any candidate except for the place and number for which he announced in his declaration filed with the legally constituted authorities to receive and file declarations of candidacy. Each of said places to be filled shall be designated by number according to seniority in service of the existing incumbents. If there is no such seniority, they shall be numbered in alphabetical order of the names of the incumbents. Provided, however, that this provision shall not apply to counties having a population of 300,000 or more according to the last or any subsequent Federal census except as to Judicial offices. And, provided further, that in judicial circuits now or hereafter composed of only one county, and for which more than three and less than nine circuit judges are provided, said positions shall not be numbered."

Under the facts stated in your request for opinion, it is very clear that you are now the senior incumbent in point of service. Therefore, in accordance with the plain, clear and unambiguous language of the above quoted section, which is the pertinent provision of the 1931 Primary Election Law, the place which you now occupy as a member of the House of Representatives from Hale County shall be designated as Place No. 1 in the forthcoming primary elections. This conclusion is in accordance with the holding of an opinion of this office, addressed to Hon. E. W. Pettus, Chairman, State Democratic Executive Committee, Selma, Alabama, under date of November 15, 1933, found in Biennial Report of the Attorney General, 1932-34, at page 417, which said opinion gives an exhaustive treatment of this general question. The holding of that opinion is in accordance with the conclusion hereinabove announced and that opinion is here cited in support thereof.

This disposes of the first question contained in your letter of inquiry.

In answer to the second question, it is my opinion that there is no reason, so far as the provisions of the statutes of this State on this subject are concerned, why you must seek in the forthcoming primary elections nomination or election to the same place as a member of the House of Representatives from Hale County which you now hold. The 1931 Primary Law contains no such requirement, and an exhaustive examination of all our statutes on this subject discloses that there is no such requirement. Consequently, the question of what place a present incumbent member of the House of Representatives from Hale County seeks in the forthcoming primary elections is not governed by the statutes of this State, but it is a matter that addresses itself to his discretion.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 22, 1938

Hon. R. E. Adams,
Judge of Probate,
Escambia County,
Brewton, Alabama.

Licenses—A doctor who has practiced for two years or more in another state must pay a license as provided by Schedule 106 of the 1935 Revenue Act before practicing in Alabama.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I acknowledge receipt of your letter of January 11, 1938, in which you state:

"Please refer to Schedule 106 of the Revenue Code of 1935 and especially to the last sentence thereof.

"This sentence makes the provision that no license shall be required of doctors until they shall have practiced their profession for two years. I would like to have you tell me whether this means that such doctors shall have practiced their profession for more than two years in this state before being liable for this license or if this two-year period is based on the time such doctor began to practice, regardless of the state in which he began.

"In order that I may make my point clearer, we have a doctor practicing in Escambia County who has been here less than two years, but who had practiced several years before in another state. This doctor has been cited to pay a license, and your official opinion is requested as to whether or not he is liable for such license under this statement of facts."

In my opinion, the doctor will have to pay the license as prescribed by Schedule 106 of the 1935 Revenue Act, as he has practiced his profession for two years. **Biennial Report of Attorney General, 1926-1928, p. 321.**

Schedule 106 provides as follows:

"**SCHEDULE 106.** Each person engaged in the practice of **MEDICINE, CHEMISTRY, BACTERIOLOGY, ROENTGENOLOGY,** or other similar profession, shall pay an annual license, in cities or towns of:

Over 5,000 inhabitants	\$25.00
1,000 to 5,000	10.00
All other places whether incorporated or not	5.00

but no license shall be paid to the county. If such business is conducted as a firm or as a corporation in which more than one person is engaged, each person so engaged shall pay the license as above stated. Provided that the license imposed by this Schedule shall not apply until such person shall have practiced his or her profession as long as two years."

The wording of the exception is very plain and means that a beginner is given two years' grace before he has to pay any license. There is no qualification as to where the person shall have practiced his or her profession.

The old attorney's license schedule had a similar proviso in it and the same construction was placed on it by this office.

Opinion of this office to Hon. G. H. Howard, Judge of Probate, Wetumpka, Alabama, under date of July 22, 1931, Vol. 5, (Office Edition).

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 24, 1938

Hon. M. H. Harper, Chairman,
Unemployment Compensation Commission,
Montgomery, Alabama.

Alabama Unemployment Compensation Commission—Under Act approved April 9, 1936, persons who gather crude turpentine gum held exempt from provisions of the Alabama Unemployment Compensation Act, while those who process such products are not exempt.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your request of January 17, as follows:

"I respectfully request your opinion as to whether under your opinion addressed to Hon. J. L. Kaufman, former Chairman of the Alabama Unemployment Compensation Commission, dated March 4, 1937, it necessarily follows that all labor performed in producing crude turpentine gum (oleo rosin) from a living tree, or trees of the pine species, and the services performed in processing gum spirits of turpentine and gum rosin from crude turpentine gum (oleo rosin), and processed by or for the account of the original producer of the crude turpentine gum (oleorosin), is agricultural labor. Specifically, I request your opinion as to whether the labor of persons who cut pine trees, whether the services of those who gather the sap, and whether the services performed in processing the gum spirits constitute 'agricultural labor' within the meaning of Section 2(g) of the Alabama Unemployment Compensation Act, in view of House Bill 50, approved April 9, 1936."

I am of the opinion that the Act approved April 9, 1936, *supra*, does not necessarily exempt all services in connection with the finished products mentioned in that Act, from the provisions of the Alabama Unemployment Compensation Act. In reference to the specific services which you mention, I am of the opinion that the services of those who cut the pine trees and those who gather the sap, should be classified as agricultural labor under said act, and that persons performing such services are exempt from the Alabama Unemployment Compensation Act.

I am of the opinion that services performed in the processing of gum spirits are not necessarily exempt and that under suitable regulations of your department, that those engaged in such employment would not be exempt from the terms of the Alabama Unemployment Compensation Act.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 24, 1938

Board of Revenue,
Barbour County,
Eufaula, Alabama.

Gasoline Tax—Authority of county to anticipate gasoline tax and issue warrants against same includes the right to pay interest thereon.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of letter of McDowell and McDowell, Attorneys for the Barbour County Board of Revenue, which is as follows:

"Mindful of the law that gasoline funds received by the several Counties in Alabama from the State, may not be used for any purpose but that of roads; but also mindful of the law that Counties are permitted to anticipate receipts of gasoline funds from the State, and issue warrants therefor payable out of the gasoline receipts, we are directed by the Barbour County Board of Revenue to ask an opinion of the Attorney General as to whether or not in issuing warrants for anticipated revenues out of the gasoline funds, interest on the funds borrowed could be paid out of the gasoline receipts. We would naturally assume that it would be legal, but in the abundance of precaution we desire an opinion."

I am of the opinion that the inquiry in question should be answered in the affirmative.

This office has repeatedly ruled that a county may anticipate its receipts from the gasoline tax for certain road and bridge purposes, and issue warrants against same payable at a future date.—**Biennial Report of Attorney General, 1932-1934, page 407; Quarterly Report of Attorney General, Vol. V, pp. 32 and 38; Quarterly Report of Attorney General, Vol. VIII, p. 89.** See also *In re Opinions of the Justices*, 163 So. 105; *Herbert v. Perry et al.*, 2nd Div. No. 107 (in MS.); *Lyon v. Shelby Co.*, 177 So. 306. The Herbert and Lyon cases and some of the opinions above cited use the words "interest bearing warrants" in dealing with this subject.

A county having the authority to contract may engage to pay interest on a warrant otherwise validly issued. Such comprehends the engagement for and the payment of interest as an incident to the principal obligation validly assumed.—*Littlejohn v. Littlejohn*, 195 Ala. 614, 71 So. 448; *Stone v. State*, 204 Ala. 13, 85 So. 443.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 25, 1938

Hon. Gordon Davis,
Circuit Solicitor,
Tuscaloosa County,
Tuscaloosa, Alabama.

Lottery—Gaming—

Giving chances on prizes or premiums by merchants when consideration is directly or indirectly taken for said chances, is violative of Section 65 of the Constitution of Alabama of 1901 and Section 4247 of the Code of Alabama of 1923.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of August 27, 1937, in which you request a review by this office of the opinion rendered under date of December 3, 1935, to Hon. John K. Watkins, Solicitor, Fifth Judicial Circuit, Lee County, Opelika, Alabama. Your request is as follows:

"On or about December 3rd, 1935, your office rendered an opinion to Hon. John K. Watkins, Solicitor of the Fifth Judicial Circuit, Lee County, at Opelika, Alabama, concerning the operation of what is known as "Bank Night" in connection with the theater business. As you know, the above styled case is on appeal in the Supreme Court concerning the operation of "Bank Night" in connection with the theaters in Tuscaloosa. The Court of Appeals, as you are aware, has held that the bank night, as operated by the theaters in Tuscaloosa, is a lottery and the defendant has made application for rehearing, no doubt, with the view of taking the case to the Supreme Court.

"I, therefore, wish to request that the opinion rendered to Mr. Watkins be reviewed and revised and the conclusion reached in said opinion be corrected."

Upon more mature consideration, I am of the opinion that the scheme described in Solicitor Watkin's request for opinion is violative of Section 65 of the Constitution of 1901, and of Section 4247 of the Code of Alabama of 1923, in that it is a lottery or gift enterprise.

You will note that the Watkin's opinion is based on the assumption that "No consideration direct or indirect is given for the chance at one or more premiums as referred to" in the request for opinion.

Upon consideration, I am of the opinion that such an assumption was not warranted from the statement of facts, and I, therefore, reach the conclusion detailed above.

Section 65 of the Constitution of 1901 is as follows:

"Section 65. The legislature shall have no power to authorize lotteries or gift enterprises for any purposes, and shall pass laws to prohibit the sale in this state of lottery or gift enterprise tickets, or tickets in any scheme in the nature of lottery; and all acts, or parts of acts heretofore passed by the legislature of this state, authorizing a lottery or lotteries, and all acts amendatory thereof, or supplemental thereto, are hereby avoided."

Section 4247 of the Code of Alabama, 1923, states the legislative prohibition against lotteries as follows:

"Section 4247. Carrying on or representing lottery; selling tickets in same.—Any person who sets up, carries on, or is concerned in setting up or carrying on any lottery or device of like kind, or any gift enterprises, or any scheme in the nature of a lottery or gift enterprise or who sells or disposes of any lottery or gift enterprise ticket, or ticket in any scheme in the nature of a lottery or gift enterprise; or who shall receive money or take an order for any lottery or gift enterprise ticket, or any ticket in any scheme in the nature of a lottery or gift enterprise; or who is interested or concerned in selling or disposing of any ticket in any lottery or gift enterprise, or scheme in the nature of a lottery or gift enterprise; or who shall act for or represent any other person in selling or disposing of any such ticket, must, on the first conviction, be fined not less than twenty-five nor more than five hundred dollars; and, on the second conviction, must be fined not less than fifty nor more than five hundred dollars, and must also be imprisoned in the county jail, or sentenced to hard labor for the county, for not less than thirty nor more than ninety days; and on the third or any subsequent conviction, must be fined not less than one hundred nor more than one thousand dollars, and must also be imprisoned in the county jail, or sentenced to hard labor for the county, for not less than six nor more than twelve months."

Nor is the case of **Yellow-Stone-Kit v. State**, 88 Ala. 196, applicable to the facts detailed in Mr. Watkins' request. Beyond defining what constitutes a lottery, I cannot see that it has any bearing upon the question raised by said request. In the **Yellow-Stone-Kit** case, the "chances" dealt out were really and in truth free "chances." Under the facts detailed by Solicitor Watkins, it was necessary that a person purchase goods before he was entitled to a chance to participate in the drawing or lottery. This was sufficient consideration to constitute the plan a lottery and therefore make it in violation of Section 65 of the Constitution and Code Section 4247.

There are three elements necessary to constitute a lottery—one, a prize; two, a chance; and three, a consideration. Elements one and two readily appear to be present in the scheme or lottery which is operated by the parties mentioned in Solicitor Watkins' letter. The only doubt is whether or not the plan operated is void of consideration and therefore not a lottery.

In **Davenport v. City of Ottawa** (Kansas) 39 Pac. 708, it appears that a firm placed in its window a locked box containing \$25.00, and advertised that all persons buying goods in their store to the amount of fifty cents or more, would receive a key, and only one key would be given out which would unlock the box, and that the person receiving the key which would unlock the box, would be given the \$25.00. The accused sold goods to various persons at the usual and ordinary prices, without extra charge on account of the key, and gave to each of these persons a key, to which was attached a note stating the above offer. It was held that these transactions were, in effect, sales of merchandise and lottery tickets for an aggregate price, and that the conviction of a member of the firm was proper under an ordinance prohibiting the sale and offering the sale of lottery tickets.

The facts in the **Davenport** case are on all fours with the facts detailed by Solicitor Watkins. Whether the customer be given a key or a ticket which entitles him to participate in a lottery, there is no difference. The principle is nevertheless the same. As stated in the **Davenport** case:

"In this instance, it may be conceded that the main purpose of the defendant was to increase his legitimate business by this scheme, and that the sale of merchandise was not used merely as a cover for conducting a lottery. The purpose of the defendant undoubtedly was to

attract attention and stimulate trade at his store; but this case must be determined by the legal principles applicable to it. Suppose that instead of a large stock of general merchandise, on which only moderate profits are made, the defendant kept only such articles as usually bear a very high percentage of profit, and instead of offering \$25 had offered \$1,000, on precisely the same terms as this \$25 was offered, could any one doubt for a moment that those who are inclined to invest small sums for the purpose of gaining large ones would be likely to purchase articles for which they had no special need, merely with the hope of gaining the prize offered? Though the goods in such a case should be sold only at the regular retail price, the main business of the defendant would become that of selling chances to draw the \$1,000, rather than merchandise for a legitimate profit."

The case of *State v. Mumford*, 73 Mo. 647, is also directly in point. In that case it appears that the proprietors of a newspaper offered to each person who would subscribe at the usual subscription price for the paper during a given year, a ticket which entitled the holder to participate in a distribution of prizes. The distribution was made by lot. It was held that the scheme was a lottery within the purview and criminal laws and it made no difference that the tickets were not sold, but were given to subscribers and to no one else.

The court stated in its opinion that:

"The fact that the subscription price of the *Times* was not increased does not alter the character of the scheme, inasmuch as the price paid entitled the subscriber to a ticket in the lottery as well as to a copy of the paper."

Your attention is also directed to the following cases which are based on similar propositions of law:

Horner v. U. S. 147 U. S. 449, 13 Sup. Ct. 409, 37 L.Ed. 237;

State v. Shorts, 32 N. J. Law, 398, 90 Am. Dec. 668;

State v. Powell, (Minnesota) 212 N. W. 169.

In the *Powell* case, for each dollar's worth of merchandise purchased, the merchant gave purchaser a ticket entitling him to participate in a prize drawing. The Minnesota court held:

"The purchaser pays a consideration when he buys his merchandise. When he pays his dollar, he gets in return the merchandise and a chance to get a prize."

Moreover in a recent case from the State of Georgia, **Gorman v. State**, 54 Ga. App. 738, the learned Court of Georgia quoted from **Myer v. State**, 112 Ga. 20, 57 S. E. 96, where it said:

"A merchant who gives to a designated class of customers an opportunity to secure by lot or chance any article of value additional to that for which such customers have paid, violates the provisions of the Penal Code which declares that no person 'shall keep, maintain, or employ or carry on any lottery in this State, or other scheme or device for the hazardry of any money or valuable things'."

The Appellate Court then makes the following statement:

"Mutuality of Risk is not necessary to constitute a lottery. The player or as in the present case, the purchaser of a ticket may get value

received and the whole risk be assumed by the operator 'there must be between them a chance of gain and a chance of loss; but it does not follow that each of the parties to the bet must have both these chances'."

The cases above cited are only a few of the numerous decisions of the courts of the various states of the Union which reached the conclusion that an operation, such as that mentioned in Solicitor Watkins' letter, is a lottery and violates the provisions of the lottery laws of the various states in question.

The Supreme Court of Alabama in the recent case of **Cecil Grimes v. State of Alabama**, 6th Div. 226 (MS) in passing on a question involving the legality of a "Bank Night" scheme tore through the chaff that has surrounded these schemes and schemes of a similar nature for so many years when it spoke as follows:

"The very fact that it is a business enterprise intended to swell the receipts from paid admissions to the theater, evidences an intention to garner a profit from the gift enterprise. For practical purposes the measure of the consideration moving to him is the excess of receipts from paid admissions on Bank Nights, over what they would have been for the entertainment in the absence of the Bank Night attraction. * * *

"It is not of consequence whether either the operator or the patron has figured just how much of the admission charge is paid for the chance. **"Gift enterprise" in the nature of a lottery, definitely covers a lottery in aid of legitimate business, through colorable gifts, but in fact prizes awarded by chance for a price.** * * *

"Theorize as one may, it remains, that looking through form and dealing with reality, the plan is intended to fill the theater, not the lobby outside. The more on the outside, the less the chance of those on the inside. To minimize the one and increase the other is part of the necessary intendment.

"The results, the success of the plan in swelling the patronage and consequent income through the scheme of chance, is the final proof of a consideration paid and a consideration received. * * * " (Emphasis supplied).

It appearing from the foregoing citations of authority that the Watkins opinion issued under date of December 3, 1935, is technically incorrect, the same is therefore withdrawn and this opinion substituted in its stead, my conclusion being that such an operation is in violation of Section 65 of the Constitution of Alabama of 1901 as well as Section 4247 of the Code of Alabama of 1923, both of which I have quoted, supra.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 26, 1938

Hon. H. N. Watson,
Clerk of Circuit Court,
Macon County,
Tuskegee, Alabama.

Witnesses—Claims of witnesses before Grand Jury may become claims against fine and forfeiture fund.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

This is to acknowledge your letter of December 9, 1937, which is as follows:

"The Grand Jury of Macon County in the Fall of 1936 recommended that impeachment proceedings be instituted against the late W. C. Daniel, former Sheriff of this county.

"Numerous witnesses were subpoenaed before the Grand Jury in connection with this report. These witnesses have not as yet received any compensation for their attendance.

"I desire an opinion from your office as to whether or not the fees of witnesses before a Grand Jury which recommends the impeachment of an official are legal and proper charges against the Fine and Forfeiture Fund.

"If they are proper charges against the Fine and Forfeiture Fund, is it necessary for the Clerk of the Circuit Court to issue an execution against the property and effects of the officer at whom the impeachment proceedings are directed before the claims could be legally paid out of the Fine and Forfeiture Fund?"

As Mr. Daniels was impeached, the fees of the witnesses before the Grand Jury are governed by Section 3763, Code of Alabama, 1923 which is as follows:

"Section 3763. HOW TAXED AND PAID.—The fees of witnesses, subpoenaed on the part of the state to appear before the grand jury, or before any court in which a criminal prosecution is pending, must be taxed against the defendant, if he is convicted, or against the prosecutor when the costs are imposed on him; but if the defendant is not convicted, and the costs are not imposed on the prosecutor, or if the indictment is withdrawn and filed, or the prosecution abated by the death of the defendant, or if the costs are imposed on either the defendant or the prosecutor, and an execution against him for the same is returned 'no property found,' or if no indictment is found by the grand jury before whom the witnesses appear, or if a nolle prosequi is entered in the case, such fees must be paid by the county in the manner specified in section 3769 (6666)."

If the sheriff is unable to collect the costs out of the defendant's estate and enters a return "no property found," then such costs become a charge against the fine and forfeiture fund under the authority of Section 4039, Code of Alabama, 1923.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 1, 1938

Hon. John D. McQueen, Chairman,
State Democratic Executive Committee,
Tuscaloosa, Alabama.

Elections—Qualifying fee for circuit solicitors for nomination in primary election is based on two per cent of the actual salary of such office for one year from every lawful source. The expense allowance provided for in Acts 1932, p. 300, is not part of said salary, and is not taken into consideration in determining the amount of the assessment.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of January 28, 1931, which is as follows:

"Under the authority of the 1931 Primary Act, the State Democratic Executive Committee has fixed the qualifying fees for candidates, in the 1938 primaries, for nomination for offices carrying a salary 'two per cent of the salary of such office for one year, from every lawful source.' You will recall that under the Act of 1932,—Acts 1932 Extra Session, page 300, it is provided that Circuit Solicitors in Judicial Circuits of more than one County, shall receive the sum of \$100.00 per year for each county of their Judicial Circuit, over and above one, the said additional allowance to be in reimbursement for the reasonable expenses while in attendance in Court outside of their home county.

"Please give me your opinion as to whether this additional sum of \$100.00 per county is a part of the salary of the Solicitors, to be taken in consideration in determining the amount of the assessment against candidates for Circuit Solicitor.

"I will personally appreciate your giving this matter your very prompt attention as it is a matter of considerable importance to the various candidates for Solicitor, in view of the fact that as a legal proposition, if this additional \$100.00 is to be considered a part of the salary, two per cent thereof should be included in the assessment, and the payment of the proper amount of the assessment is a legal requirement for the proper qualification of the candidate.

"Please, therefore, let me have your opinion on this subject just as promptly as possible."

I am of the opinion that your inquiry should be answered in the negative.

In an opinion of this office rendered to Hon. R. B. Carr, Judge of the Seventh Judicial Circuit, Anniston, Alabama, on February 13, 1936, (Quarterly Report of Attorney General, Volume II, page 161) it was held that the provisions of Act 1932, p. 301, for an expense allowance to circuit judges and circuit solicitors was not repealed by Acts 1933, p. 124. In said opinion it was held that this expense allowance was not part of the salary of said circuit judges and circuit solicitors, but was merely a reimbursement for actual expenses. The distinction between "salary" or "compensation" and "allowances for expenses" was taken into consideration.—See also *Osborne v. Henry*, 200 Ala. 353, and cases cited therein; *Macon County v. Williams*, 224 S. W. 835; *Brandon v. Askew*, 178 Ala. 160.

In view of the above, it is my opinion that the expense allowance provided by the 1932 Act, *supra*, is not part of the salary and is not taken into consideration in determining the amount of the assessment against the candidates for circuit solicitor. Therefore, the assessment would be only two per cent of the salary of such office for one year from every lawful source not including the allowance provided for in the 1932 Act.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 2, 1938

Hon. L. W. Price,
Judge of Probate,
Conecuh County,
Evergreen, Alabama.

License—Schedule 146, Section 348, Article 13, Chapter 1, Revenue Act of 1935, page 256, as amended by Act No. 230, Acts of 1936-37, page 277.

Operator of rolling store who sells tobacco products is subject to the highest license provided by Schedule 32, Revenue Act of Alabama of 1935, page 451.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your inquiry of recent date as follows:

"Some persons in Conecuh County are selling tobacco, cigarettes and etc., on rolling stores. Citations have been issued against some of these for selling these articles. The State Tax Commission rules that persons operating rolling stores and who sells tobacco products therefrom are liable for a privilege license for making such sales.

"Will you please advise as follows: Under Bill Number 230, House Bill 180 by McDermott, Acts of the extra session of Legislature of 1936-1937, schedule 146, page 288 Simon's Code, is a person who has purchased a privilege license to operate a rolling store and who handles on said rolling store, tobacco, cigarettes and etc., liable for a privilege license for handling such tobacco products.

"Inasmuch as citations have been issued and are here in the Probate Office, will you please advise me at the very earliest possible date."

It is my opinion that the operator of a rolling store who sells tobacco products as outlined in the aforementioned inquiry is subject to the highest license which is imposed by Schedule 32, Revenue Act of 1935, page 451.

This office in an opinion dated December 3, 1935, to Hon. Frank M. Johnson, Judge of Probate, Winston County, Double Springs, Alabama, reported in Quarterly Reports of the Attorney General, Vol. I, page 279, held that there was no authority to issue a license to a rolling store to sell tobacco products. This opinion further held that such products are required to be sold at fixed locations. I quote from said opinion as follows:

"It is clear, I think, that proviso contemplates the issuance of a license for a fixed place of business. A rolling store necessarily has no

fixed place of business and a license would, therefore, not be issuable to authorize it to sell one of the products for which a special license is required and which is required to be sold at a fixed location."

The opinion to Mr. Johnson was rendered before Schedule 146 of Section 348 of Article 13, Chapter 1, of the Revenue Act of 1935 was amended by the legislature according to the terms of Act No. 230, General Acts of 1936-37, page 277, by addition thereto of the following as underscored:

"The payment of the privilege license required by this Schedule shall not authorize any transient vendor or peddler to sell any goods, wares, or merchandise for which a higher or specific license is required without the payment of such license in addition to the license herein levied, or to sell any goods, wares, or merchandise that are by law required to be sold at a fixed location, except upon the payment of the maximum license levied under the Schedule or Schedules of this chapter for the sale of merchandise at a fixed location."

The highest license required to be paid pursuant to the terms of the Schedule 32, supra, for the sale of the tobacco products mentioned in your letter is \$15.00, State license, plus county license.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 2, 1938

Hon. William G. Lindsey,
County Solicitor,
Washington County,
Chatom, Alabama.

Elections—Authority to establish district and precincts.

County governing body may not subdivide into election districts an election precinct which contains less than 300 legally qualified voters.

In the event election precincts were established by local law prior to the ordination of the Constitution of 1901, only the Legislature can change the same.

In the event election districts have been established under the general provisions of law, the county governing body may divide into two precincts any one which contains more than 500 legally qualified voters; or may subdivide the same into election districts.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"1. In Precinct 11, of this County, there are approximately 225 votes. This Precinct already has two voting Boxes. Can the court of County Commissioners of this County, add an additional or third box in this precinct, as a matter of convenience to the voters in part of this Precinct?

"If you answer the above in the affirmative, what procedure would the Court of County Commissioners have to take?"

"2. Can the Court of County Commissioners, legally create or add an additional Precinct, to the number of Precincts already existing or created in the County?"

"If you answer this in the affirmative, what steps or procedure would the Court have to take in creating this new and additional Precinct?"

Your first question must be answered in the negative. Section 427 of the Code of 1923 provides for the division of election precincts into election districts, and the establishment of separate voting places therein only in the event that there are, at the time of the action of the county governing body effecting said division, more than 300 legal voters in said election precinct.

Your second question must be answered conditionally. In the event that existing election precincts in Washington County were fixed by local law prior to the ordination of the Constitution of 1901, the only authority which may effect a change in the said precincts is the Legislature itself. *Schulte v. Wilke*, 167 Ala. 664.

In the event, however, that the election precincts have been established under the general provisions of law, as contra-distinguished from the provisions of local acts, Section 425 of the Code of 1923 is applicable; and the county governing body may, in the event the now existing precinct contains more than 500 legal voters, divide the same into two precincts, or may subdivide the same into election districts.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 3, 1938

Hon. Howell Turner,
Secretary of State,
CAPITOL.

Registrars—Expenses incurred during calendar year of 1935, for publication and posting of notices, held payable by the State.

Opinion by the Attorney General.

Dear Sir:

I have your letter of recent date in which you refer to an opinion of the Attorney General of November 29, 1937, addressed to the Secretary of State. The opinion referred to by you holds that the State of Alabama shall pay the expenses incurred in posting or publishing the notices required to be given by Boards of Registrars.

You now ask whether or not the expenses of publishing or posting such notices incurred during the calendar year 1935, may now be paid.

In reply, I wish to advise, that in my opinion the cost of the publication and posting of said notices, during the calendar year 1935, may be paid.

I assume that these claims have been presented to you during the current fiscal year.

I wish to refer you to Section 386 of the Code of 1923:

"386. Registration books, forms and blanks furnished by Secretary of State.—The Secretary of State shall, at the expense of the State, have prepared and furnished to the registrars and judges of probate in the several counties a sufficient number of registration books and blank forms of oath, certificates of registration, and of notices required to be given by registrars. The cost of the publication of the notices required to be given by the registrars shall be paid by the State, the bills therefor to be rendered to the Secretary of State and approved by him."

I wish to refer you also to Section 375, Code of Alabama, 1923, as amended, as follows:

"* * * They shall give at least twenty days' notice of the time when, and the place in the precinct where they will attend to register applicants for registration, by bills posted at three or more public places in each election precinct, and by advertisements once a week for three successive weeks in a newspaper, if there be one published in the County.
* * *"

You will observe that the law requires the services mentioned to be performed by the Boards of Registrars and further provides that payment for the same shall be made by the State.

No statute of limitation exists against the presentment of these particular claims. Claims of this nature have been declared to be essential functions of government. *Abramson v. Hard*, 229 Ala. 9.

The law requires their payment when presented and approved. Code of 1923, Section 375 and 386.

Under an opinion of the Attorney General of April 9, 1935, addressed to the State Comptroller, and reported in Office Edition, Vol. 3-A, page 124, claims of this nature become a charge upon the appropriation of the fiscal year in which they were audited and approved. See *Allgood, Auditor, vs. Stallings, et al.*, 197 Ala. 121.

It is my opinion that the claims here considered may be paid from the fiscal years' appropriation upon audit and approval, in the manner provided by law.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 4, 1938

Hon. H. E. Williams, Superintendent,
Board of Education,
Lauderdale County,
Florence, Alabama.

County Boards of Education are without authority to make appropriations out of educational funds for salaries of County Farm Demonstration Agents and Home Demonstration Agents.

Opinion by Assistant Attorney General King.

Dear Sir:

I have your request for opinion as follows:

"The Lauderdale County Board of Education has been paying \$58.00 per month on the county agent's salary and \$40.00 per month on the home demonstration agent's salary for a number of years. I know that there has been a ruling from the Attorney General's office to the effect that such payments were legal and it was customary to pay such appropriations from the bonus fund.

"Under the new minimum school program it is my understanding a number of funds have been merged and that there is no special bonus fund as was provided under the old law. The state auditors who have recently audited the records of my office seem to have some doubt as to whether or not it is legal for the board of education to pay county agents under the present minimum education program law. Please advise me whether or not such payments are legal under the present minimum program law?

"I know that the present minimum program law does not specifically provide for such appropriations and it seems to me that such agencies should be provided for out of other funds without using our educational funds which are already totally inadequate for our present educational program. I doubt that our board will continue such appropriations even if legal, however, I am anxious to have your opinion on this question under the present law."

In my opinion your question should be answered in the negative.

I know of no provision of law which authorizes County Boards of Education to make appropriations out of the Minimum Program Fund for salaries of County Farm Demonstration Agents or Home Demonstrating Agents.

Sections 1 and 2 of Act No. 295, approved September 2, 1935, (General Acts 1935, page 714) set forth the uses to which such Minimum Program Fund may be employed, which uses do not include the subject of your inquiry.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 5, 1938

Hon. Roy Johnson,
Tax Assessor,
Jefferson County,
Birmingham, Alabama.

Officers—

The Tax Assessor and Tax Collector of Jefferson County are "county officers" rather than "state officers," when said phrases are employed in their ordinary and usual acceptations.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"Will you please advise me by an official opinion whether or not the Tax Collector and Tax Assessor are purely county officers or whether they are state officers?"

An absolutely accurate answer to your inquiry will have to be predicated upon the connotation intended by the use of the phrases "county officers" and "state officers." The applicability of either of said phrases will depend upon the situation in each instance in which the same are sought to be used. However, the Supreme Court in a recent opinion of the justices thereof (143 So. 345) had under consideration, an inquiry from the House of Representatives as to whether or not certain officers in Jefferson County including the Tax Collector and Tax Assessor thereof were state officers or county officers. The inquiry was couched in the following language:

"Whereas, there is a question in the minds of members of the House of Representatives of the State of Alabama as to whether the following office holders of Jefferson County, Alabama, are county officers within the meaning of the Second Amendment to the Constitution of Alabama, 1901, such office holders being as follows:

(Here are listed the several officers)

"And, whereas, the House of Representatives of the State of Alabama desires to obtain from the Justices of the Supreme Court, or a majority thereof, a written opinion on this important constitutional question.

"Wherefore, be it resolved by the House of Representatives of the State of Alabama, that the Justices of the Supreme Court of Alabama, or a majority thereof, render to said House of Representatives a written opinion of said question hereinabove set out.

The response of the Justices is as follows:

"Replying to Resolution 52, inquiring if the officeholders there mentioned are county officers within the meaning of amendment 2 to the Constitution of 1901, will say: While they all hold office under the state, all except the circuit judges and solicitors are, strictly speaking, county officers as included in and dealt with in said amendment. The circuit judges and solicitors are what might be termed circuit or state officers. State ex rel. Montgomery v. Merrill, 218 Ala. 149, 117 So. 473."

It is therefore my opinion that in the ordinary and usual acceptance of the phrases, the tax assessor and the tax collector of Jefferson County are "county officers" as contra-distinguished from "state officers."

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 5, 1938

Hon. Chas. W. Lee,
State Comptroller,
CAPITOL.

Justices of the Peace—

A Justice of the Peace or other Inferior Court Judge is not liable for imposing, through mistaken view of the law, a lesser fine as punishment for offense than the minimum provided by law.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"If a magistrate reduces the fine in a misdemeanor below the minimum provided by law, is he liable for the difference? If he is not liable what is the recourse for the violation?"

It is assumed that your request contemplates that a person is duly brought before a Justice of the Peace Court or other Inferior Court Judge charged with an offense of which the Court has final jurisdiction. There are certain offenses which, when judged in the manner and form provided by law, encompass within the same charge lesser offenses. In such cases, if the evidence does not warrant conviction of the higher offense but does warrant conviction of the lesser offense, the Court or Judge is entirely within his authority and province to find the defendant not guilty of the higher offense charged in the complaint, but to find him guilty of the lesser, and to fix the punishment accordingly. Of course, a Judge is not warranted in finding the defendant guilty of a lesser offense when the evidence shows beyond reasonable doubt that he is guilty of the higher offense charged.

It is doubtful that the Judge who, through a mistaken view of the law, assesses a fine, or fixes other punishment, for a criminal offense, at less than the minimum provided by law, could be held liable for the difference in the fine so fixed and the said minimum provided by law. However, if a judge knowingly and willfully permitted a defendant to pay a lesser fine than the minimum provided for the offense charged, it would be corruption and misconduct in office and would be grounds for impeachment.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 5, 1938

Hon. J. J. Cockrell,
Judge of Inferior Court,
Talladega County,
Talladega, Alabama.

The Judge of the Inferior Court of Talladega County cannot try a criminal offense of which he has jurisdiction where the defendant appears and demands trial by jury. The case must be sent to the Circuit Court under the provisions of Section 3854, Code of Alabama, 1923.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of January 3, 1938, in which you request my opinion as follows:

"The patrol officers have made a case in the Inferior Court of Talladega, of which I am the Judge, against a man for driving an automobile without first obtaining a driver's license. The defendant comes in under Section 3854 of Code of 1923 and demands a trial by jury before the case is called. Does this oust my jurisdiction? For your information see Elmore vs. State, 137 So. 462."

"You, as Judge of the Inferior Court of Talladega County, have the same jurisdiction as is conferred upon Justices of the Peace. This being true, you are required in all cases, where you have jurisdiction, if the defendant seasonably appears in court and demands a trial by jury under Section 3854, Code of Alabama, 1923, to grant such request and must require bond as indicated in this section and the case goes to the Circuit Court. This section is as follows:

"Section 3854. PROCEEDINGS WHEN DEFENDANT DEMANDS TRIAL BY JURY.—If the defendant demands a trial by jury, he must be required to enter into bond, with good sureties, conditioned for his appearance at the next session of the circuit court of the county to answer the charge; and, failing to give such bond, must be committed to the county jail until the next session of the circuit court having jurisdiction of the offense, unless he elect, in the meantime, to perform hard labor for the county as provided by law."

See cases of *Jones v. State*, 149 Ala. 63; *Jones v. State*, 168 Ala. 107; *Elmore v. State*, 137 So. 462.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 5, 1938

Board of Revenue,
Sumter County,
Livingston, Alabama.

Counties—Under facts set out Sumter County is not authorized to borrow surplus from sinking fund, which is for specific purpose of retiring refunded Road and Bridge Bonds, to construct county office building and issue interest bearing general fund warrants to sinking fund all of which will be repaid before maturity date of bonds.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of letters of December 30, 1937, and January 20, 1938, signed by T. V. White, Clerk, Board of Revenue, which are in substance as follows:

"The Board of Revenue of Sumter County, Alabama, requests your early opinion on the following matter:

"The following is a resolution regularly passed by the Board of Revenue:

"Whereas the present Sumter County Courthouse is highly inadequate to house the officials to whom the Board of Revenue is required by law to furnish office space, and whereas it is very expensive, inconvenient if not practically impossible to rent the necessary office space, and whereas the Board of Revenue finds that there is an accumulated surplus of the road and bridge fund over and above the amount necessary to meet the annual interest and maturing installments on the principal of the road and bridge bonds, and whereas the Board of Revenue finds that it is practically impossible to satisfactorily invest said funds in outside securities or in the bank on interest, and whereas the Board of Revenue further finds that the annual rent saved the County would over a practical period of years pay for a building sufficient to meet the County's needs, and whereas the Board of Revenue further finds that the receipts of the general fund of the County would be more than ample over and above the regular budget to retire any loan made for said building purpose together with interest thereon before the year 1955 when the last maturing road and bridge bonds become due;

"Therefore Be It Resolved By the Board of Revenue of Sumter County, Alabama, That an office building sufficient to meet the needs of the County be erected on the Courthouse square in Livingston, Alabama; and that the General Fund of the County for the purpose of financing the same borrow from the surplus in the road and bridge fund the sum sufficient and issue therefor interest bearing securities; And Be It Further Resolved That E. H. Longshore president of the Board and T. V. White Clerk of the Board be appointed as a building committee to work out the details and have general supervision of the matters herein mentioned.

"The above resolution will give you most of the facts involved. The details of the pay back of the loan have not been entirely settled but the entire loan would be repaid before 1955 when the last maturing road and bridge bonds mature. When the road and bridge bonds were floated the road and bridge tax were specifically pledged to retire the bonds but said bonds were issued under the Municipal Bond Code which requires the sinking fund to be invested on interest or placed in the Bank on interest.

"The Board wishes your opinion as to whether in accordance with the above resolution it would be legal for the General Fund to borrow from the sinking fund of the Road and Bridge Fund any surplus accumulated over and above the amount necessary to meet the annual interest and maturing installments of the Road and Bridge Bonds, for the purpose declared in the resolution, and have the General Fund issue to the Road and Bridge Fund its interest bearing warrants all of which are to be repaid before the last Road and Bridge Bonds mature.

"When the Sumter County Road and Bridge Bonds were refunded under the Municipal Bond Code of 1927 the Road and Bridge Tax were pledged for the retirement of the Bonds. This tax each year goes into the sinking fund for the retirement of the Bonds, but the fund is accumulating a surplus over and above the amount necessary to care for each years installment of principal and interest. This surplus fund is not lent to any Bank on interest or invested in any of the securities provided for in the Bond Code relating to investment of Sinking Funds. The Resolution sent you provides for the General Fund borrowing this surplus in the Sinking Fund and issuing interest bearing Warrants for

it all of which are to be repaid before the last Road and Bridge Refunding Bonds mature, the borrowed money to be used to erect the Court house addition. The Board wishes to know whether in the light of the pledge of the funds and the provisions of the Bond Code of 1927 for investment of sinking funds, the method of financing and the use of the funds as set out in the Resolution, the Resolution can be legally carried out."

I am of the opinion your inquiry should be answered in the negative.

From the facts set out above, it appears that the bonds in question were issued for the specific purpose of refunding certain outstanding Road and Bridge Bonds of Sumter County under the provisions of the Municipal Bond Code of 1927. The road and bridge tax was pledged for the retirement of the bonds and each year said tax goes into a sinking fund for this specific purpose.

3436 p 248
A. A. Carmichael
Sinking funds, under the provisions of the Municipal Bond Code, can be invested only according to the provisions of Section 2294(61) Michie's Code of 1923, as amended by Acts 1935, p. 581. This office has ruled that the sinking funds providing for the retirement of bonds must be invested in bonds of the United States of America or in bonds of the State of Alabama or bonds of any county of the State of Alabama or any municipal corporation of the State of Alabama or deposited in bank on interest.—**Opinion of Attorney General to Judge of Probate of Randolph County on September 16, 1935.** We have also ruled that counties are not authorized to use cash balance in bond sinking fund accounts to pay current claims, reimbursing the sinking fund thereafter by payments from the general fund of amounts equal to the installments which would have matured on such current claims.—**Opinion of Attorney General to the President of the Board of Revenue, Shelby County, July 8, 1935.** From the foregoing, it appears that the investment of county sinking funds for the retirement of bonds is limited. And this is specifically true in the instant case, as the tax in question is pledged for the specific purpose of retiring the bonds in question.

This opinion is not in conflict with the one rendered to the Board of Revenue of Barbour County on July 18, 1936, (Quarterly Report of Attorney General, Vol. 3, p. 172), as in that opinion the particular facts authorized temporary loans from surplus funds collected to retire bonds to meet necessary current governmental expenses. There was a surplus each year in the sinking fund as the bonds were retired regularly. In other words, there was a sufficient amount each year to meet the retirement of the bonds according to the schedule set out in said opinion. This opinion is not in conflict with an opinion rendered to the Judge of Probate of DeKalb County on August 16, 1934 (Biennial Report of Attorney General, 1932-34, p. 621), as the sinking fund referred to in that opinion is the one provided for by sub-section 22 of Section 6755, Code of Alabama, 1923, as amended by Acts 1931, p. 759.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 7, 1938

Hon. F. B. Thompson,
Judge of Probate,
Clay County,
Ashland, Alabama.

Taxation—Motor Vehicle Licenses—

Under the provisions of Acts, Extra Session 1936-37, p. 108, amending Schedule 158.5 of the Revenue Act, 1935, the applicant for motor vehicle license tag who owns motor vehicle since the beginning of the current tax year, but who used and operated the same wholly without the State of Alabama until after November 15 of said tax year is entitled to the monthly declining rate provided therein.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"Your opinion is requested in the following case. Mr. Walker Steed of this county purchased a motor truck in January 1937 and purchased a tag for same in this county and operated said truck in this state until some time in September—not later than September 30, 1937—at which time he went to Mississippi and he has used said truck in Mississippi under a Mississippi tag, purchased in that state after he went there. He now returns to this county in January, 1938, and wishes to buy a tag for this truck under terms of an act to amend Sec. 158 of Chapter 6, Article 13 of an act entitled 'An Act to provide for the general revenue of the State of Alabama,' approved July 10, 1935, found on page 108 of the General and Local Acts of Alabama, Extra Session 1936-37. May I issue a license tag for his truck at the monthly declining rate?"

In my opinion, under the facts stated a motor vehicle license tag may be issued to the applicant therefor upon the payment of the license therefor arrived at by application of the monthly declining rate as is provided for by Acts, Extra Session, 1936-37, p. 108, which amends Section 158.5 of the Revenue Act, 1935. After levying the tax, it is provided:

"Provided, however, except for trucks purchased prior to November 15th of any tax year that the licenses called for under this schedule shall be purchased on a monthly declining basis of one-twelfth (1/12) or for each month of the tax year, and that the purchaser shall only buy a license for the then remaining months of the tax year. * * *"

Under the facts stated in your inquiry the motor vehicle was not "purchased" prior to November 15th of the tax year for which the application is made for the motor vehicle tag. Of course, the current tax year begins October first. The statutes provide a grace period within which an applicant may procure a motor vehicle license tag without the payment of penalty or citation fee. It would be manifestly inequitable in view of this grace period to allow an applicant who has operated a motor vehicle during the grace period the benefit of the monthly declining rate. However, it would be just as inequitable to require an owner of a vehicle during all of the tax year, who had not used the same on the roadway in violation of the motor vehicle laws of the State to procure a license for the entire tax year and to deny to him the benefits of the monthly declining rate. Such was not the legislative intention.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 7, 1938

Hon. Henry S. Long,
State Tax Commission,
CAPITOL.

Taxation—Store License—Optometrist—Revenue Act No. 256—
Schedule 155, page 505.

Optometrist who has paid license to practice optometry is liable for store license if he sells eyeglass frames in connection with his professional services.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your inquiry which I quote as follows:

"Are optometrists, who sell eyeglass frames exclusively to clients in connection with professional services rendered, subject to the payment of a store license under Schedule 155, Revenue Act of 1935?"

It is my opinion that an optometrist who has paid a license to practice his profession is liable for store license if in connection with such professional services he sells eyeglass frames to his patients.

Revenue Act No. 256, Schedule 155, General Acts of Alabama, page 505, provides that:

"From and after the first day of January, 1936, it shall be unlawful for any person, firm, corporation, association or co-partnership, either foreign or domestic, to operate, maintain, open or establish any store in this state without first having obtained the license so to do from the State Tax Commission, as hereinafter provided."

A store has been defined as follows:

"'Store' is defined by Webster as any place where goods are sold, either by wholesale or retail. *Salamon v. Pioneer Cooperative Co.*, 21 Fla. 374, 385, 58 American Rep. 667; *Martin v. City of Portland*, 17 Atl. 72, 73, 81 Maine 293; *Petty v. State*, 22 S. W. 654, 655, 58 Ark. 1; *Sparrenberger v. State*, 53 Ala. 481, 483, 25 Am. Rep. 643."

The Supreme Court of Alabama, speaking through Justice Thomas, in the case of *State Tax Commission of Alabama v. T. D. Hopkins*, reported in 176 So. 210, speaking to the contention of the appellee that he was not liable for the payment of Sales Tax levied by the Alabama Sales Tax Act, because he was selling service and not tangible articles, the agreed statement of facts being that the value of the material employed in the manufacture of glasses for and fitting the same to the customer was about twenty per cent of the total price charged for the manufacture and service when the glasses were completed and delivered, held as follows:

"The test as to the application and validity of the tax in such cases is not the relative value of the material and service, but the nature and character of the process, activities or manufacture required or employed. That the manner is severable, as indicated by the agreed case, does not change the fact or process of manufacture and sale of a tangible personal property made the subject of appropriate provisions of the statute. *Lone Star Cement Co. et al., v. State Tax Commission, et al.* (3rd Div. 222) MS." (Emphasis supplied).

(Note: the optometrist contended that the transaction was all services and the material incidental).

Under the foregoing decision, the Supreme Court has held that the delivery of the eyeglasses, along with the frames, constituted a delivery and/or sale of tangible articles of merchandise. Therefore, an optometrist who sells frames in connection with his professional services is operating a store.

It is common knowledge that many oculists prescribe glasses but do not sell or deliver the lenses or frames in connection with said prescription. Such transactions constitute service, but where a sale of frames and lenses is made by an optometrist in connection with his prescription, it is my opinion that such sale is not altogether service, but constitutes a sale of tangible articles. **State Tax Commission v. Hopkins**, supra.

It is true that Section 2873 of the Code of Alabama, 1923, defines optometry as follows:

"Optometry defined.—The practice of optometry is defined to be the examination of the human eye for the purpose of ascertaining any departure from the normal, measuring its functional powers and adopting mechanical means for the aid thereof."

An optometrist may measure the functional powers of the eye and adopt mechanical means for the aid thereof, but such adoption does not necessarily mean that he may sell such mechanical means without the payment of a store license. In the sense as used in the aforequoted statute, the Legislature probably was referring to a prescription for mechanical means of aiding the eyes and not the actual sale of the merchandise which is to be employed as the mechanical means of aid.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 8, 1938

Messrs. Lucien C. Brown and James A. Lipscomb,
Associate Commissioners,
Alabama Unemployment Compensation Commission,
Montgomery, Alabama.

Alabama Unemployment Compensation Commission (1) A person employed as Executive Director does not occupy an "office of profit" within the contemplation of Section 280 of the 1901 Constitution of Alabama nor in the contemplation of Section 2575(7) of the 1923 Code of Alabama.

(2) Section 7(b) of Act 447 General Acts of 1935, page 950 does not forbid the Chairman of the Alabama Unemployment Compensation Commission from performing the duties of Executive Director while acting as Chairman of the Commission.

Opinion by the Attorney General.

Gentlemen:

I have your request of February 2, 1938, as follows:

"The Alabama Unemployment Compensation Commission, created by Act 447, General Acts of 1935, page 950, did on August 12, 1937 pass and

adopt a resolution appointing M. H. Harper, Chairman, as Executive Director, and did by resolution adopted on December 14, 1937 define the duties of M. H. Harper as Executive Director as follows:

“To plan the organization and work of the administrative staff, recommend efficient personnel, and assume responsibility for the competent performance of their work;

“To assume responsibility for and direction of the functional divisions of the organization. These functions will include:

“Determination of liability for coverage under the Unemployment Compensation Law.

Collection of contributions.

Determination of employees' benefit claims.

Payment of benefits.

Appeal procedure.

Maintenance of all accounts and records.

Formulation of procedures for proper internal management and operation; arrangements for location, layout and equipment of all offices.

Direction of research and statistical reporting.

Promotion of public relations.

“To prepare the budget and maintain proper fiscal control of the insurance fund, trust fund and the administration fund;

“To act as technical adviser to the Commission on matters relating to the interpretation and administration of the Unemployment Compensation Law;

“To carry out all rules and regulations adopted by the Commission regarding the administration of the Unemployment Compensation Law and to see to the proper enforcement and legal interpretation of the Law;

“To coordinate the functions of unemployment compensation with the State Employment Service;

“To hold conferences for the training of divisional and field personnel;

“To interpret the Unemployment Compensation Law to employers, employees and the general public;”

“Please advise as follows:

(a) Does Mr. Harper, in performing the duties of Chairman of the Commission and of Executive Director, hold two offices of profit in violation of Section 280 of the Constitution and Section 2575 (7) of the Code of Alabama, 1923?

(b) Does Section 9(b) of Act No. 447, supra, forbid Mr. Harper from performing the duties of Executive Director as above outlined, while acting as Chairman of the Commission?”

In answer to your first inquiry, I am of the opinion that the position of Executive Director of the Alabama Unemployment Compensation Commission is not an “office of profit” within the contemplation of Section 280

of the 1901 Constitution of Alabama or Section 2575(7) of the 1923 Code of Alabama.

Section 280 of the 1901 Constitution is as follows:

"No person holding an office of profit under the United States, except postmasters, whose annual salaries do not exceed two hundred dollars; shall, during his continuance in such office, hold any office of profit under this state, or, unless otherwise provided in this constitution, shall any person hold two offices of profit at one and the same time under this state, except justices of the peace, constables, notaries public and commissioners of deeds."

Section 2575(7) of the 1923 Code of Alabama is as follows:

"7. No person holding an office of profit under the United States, shall, during his continuance in such office, hold any office of profit under this state; nor shall any person hold two offices of profit at one and the same time under this state, except notaries public."

It is apparent that only the latter part of Section 280 of the 1901 Constitution is pertinent to your inquiry.

Section 2575(7) of the 1923 Code of Alabama is but a legislative declaration of the provisions of Section 280 of the 1901 Constitution. *State ex rel Thomas vs. Gunter*, 170 Alabama 165. It is therefore obvious that if the position of Executive Director of the Commission is not an "office of profit" within the meaning of Section 280, it is not an "office of profit" within the contemplation of Section 2575(7).

The Supreme Court of Alabama has on several occasions defined an "office of profit", and it has consistently taken the position that unless an appointment conveys, as a necessary incident to its exercise, some part of the sovereign power of the state, the term and salary or prerequisites of which are prescribed by law, such appointment is not an "office of profit" within the purview and meaning of Section 280.

In the case of *State vs. Sanders*, 187 Alabama 79, 65 Southern 378, the question arose as to whether a state health officer was occupying an office of profit within the meaning of the constitutional prohibitions. The Supreme Court of Alabama held that while the health officer was an officer, it did not follow that he was an officer within the meaning of the constitutional prohibitions. The court said:

"The Board of Health may employ the state health officer for a day, a week, a month, or a year. The statute does not fix his term of office nor his salary or compensation. It is apparent he is not occupying an office of profit."

The Attorney General of the State of Alabama had occasion to rule on the definition of "office of profit", in deciding whether an assistant adjutant general occupied an office of profit. The Attorney General held that the assistant adjutant general was a chief clerk and "in my opinion a chief clerk is not an office of profit within the meaning of Section 280 of the Constitution." Reports of Attorney General 1918-1920, page 110.

In two cases decided by the Supreme Court of Alabama in 1929, *State ex rel Horne vs. Wilkinson*, 124 Southern 213, 220 Alabama 38, and *State ex rel Glenn vs. Wilkinson*, 124 Southern 211, 200 Alabama 172, the Supreme Court set at rest all doubts as to what constitutes an "office of profit" within the purview of the above mentioned sections of the 1901 Constitution in the 1923 Code of Alabama. In both of the cases mentioned quo warranto pro-

ceedings were filed, seeking the ouster of Horace Wilkinson as Assistant City Attorney of Birmingham and as Sheriff's Attorney of Jefferson County, the basis of both actions being that Wilkinson occupied at one and the same time two offices of profit as prohibited by Section 280 of the Constitution. The Supreme Court of Alabama held that the appointment as Sheriff's Attorney was not an "office of profit" but was employment. The court said:

"The sheriff employs the attorney, he is an employee of that official" and again, "we think it clear that the Assistant City Attorney is an employee and does not hold an office of profit. It is just as plausible to contend that the City Engineer, the Health Officer, or Municipal Surgeon are holding offices of profit under the state."

The Alabama Unemployment Compensation Commission created the position of Executive Director under the authority given it under Section 10(d) of the Alabama Unemployment Compensation Act. It is therein set out:

"The Commission subject to the written approval of the Governor is authorized within its means to appoint and fix the compensation of such officers, accountants, attorneys, experts and other persons as are necessary in the execution of its functions."

Nowhere does the act creating the Commission, create an Executive Director, provide for any term of office or salary therefor. A careful study of the act discloses no defined duties required to be performed by the Executive Director.

I conclude that the Executive Director of the Commission is in the same category as are "officers, accountants, attorneys, experts and other persons as are necessary in the execution of its functions."

It therefore follows that I am of the opinion that Mr. Harper, in performing the duties of Chairman of the Commission and of Executive Director does not hold two offices of profit in violation of Section 280 of the Constitution or Section 2575(7) of the 1923 Code of Alabama.

With reference to the second question propounded in your letter, I think a correct answer thereto depends upon whether or not the duties required of Mr. Harper as Executive Director overlap or duplicate the duties which he is required to perform as Chairman of the Commission.

In order to ascertain whether or not there is any overlapping or duplication of duties, it is necessary to refer to Section 10 of the Alabama Act, *supra*, which section appears on Page 961 of the General Acts of Alabama of 1935.

It appears from the foregoing Section 10 that Mr. Harper, as Chairman of the Commission, is required to cooperate with his Associate Members to the end that all duties imposed by that section upon the Commission may be diligently carried out and effectuated. In addition to such cooperation, Mr. Harper as Chairman, is required to preside over the Commission when it meets to deliberate upon the responsibilities and duties connected with the office. He is also required, in my judgment, to take the lead in executing and effectuating the responsibilities and duties imposed by said Section.

I have examined the duties imposed by said Section 10, for the purpose of determining whether or not they overlap or duplicate any of the duties shown by the resolution to be imposed upon the Executive Director, and I can find no such conflict or duplication. The main duties delineated in Section 10, in my judgment relate to the formulation of policies, the adop-

tion of reasonable rules and regulations for administration of the act, the adoption of general rules for interpreting or applying the act as they affect employers, employees or other persons or agencies, but only after discussion with a representative Statewide Advisory Council, or after public hearings of which notice has been given through the press. The Commission is required to print and distribute the text of the act, the Commission's general rules, its annual report to the Governor and any other material which the Commission deems relevant and suitable. Also it appoints and fixes the compensation of officers, accountants, attorneys, experts, and other persons as are necessary in the execution of its functions. It cooperates with the Advisory Councils in the formulation of policies and discusses with them problems which relate to the administration of the act. Section F of the Act in substance requires the Commission to cooperate with the Advisory Councils in the reduction and the prevention of unemployment by encouraging vocational training, retraining and vocational guidance. The Commission, pursuant to Subsection (g) of the Act, may require employers to make reports covering the persons employed by them, or such other matters as the Commission deems necessary to the effective administration of the act. The Federal Government, and its appropriate agencies, is entitled to the cooperation of the Commission according to Section I of the Act. The establishment and control of unemployment offices throughout the state is vested in the Commission.

The duties of the Executive Director which you have outlined in your inquiry are administrative, or are related to administrative acts. For instance, the Executive Director is required to plan the work of the administrative staff, to recommend efficient personnel, and assume responsibility for the competent performance of this personnel. The Commission employs the personnel, and in doing so, may consider the recommendation of the Executive Director. Also the Executive Director outlines the work of the Administrative staff so as to keep them busy. No such duties devolve upon the Commission or any member thereof. The assumption by the Executive Director of responsibility for and the direction of the functional divisions of the organization, as outlined in your inquiry, are strictly administrative, or related thereto, and do not in the least overlap or duplicate any of the duties required of the Commission. Preparation of the budget and the means of proper fiscal control of the insurance fund, trust fund and administration fund are administrative acts. I have examined each of the responsibilities and duties placed upon the Executive Director, and it is my judgment that none of them duplicate or conflict with those duties imposed upon the Commission, or upon the Chairman thereof.

It is therefore my opinion that said Section 9 of Act No. 447, supra, does not forbid Mr. Harper from performing the duties of Executive Director while acting as Chairman of the Commission.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 8, 1938

Hon. L. H. Montgomery,
Judge of Probate,
Greene County,
Eutaw, Alabama.

Registrars—

1. Registrars are empowered to purge, and charged with the duty of purging the registration list of the county.

2. A person who is a registered elector of a county and has moved his legal residence to another county in the State of Alabama is otherwise disqualified as an elector in the county where he is registered and from which he removes, under the provisions of the Constitution of Alabama of 1901, and his name should be stricken from the registration list of said County by the Board of Registrars.

3. The question of one's residence for the purpose of becoming or remaining a registered elector is a mixed question of law and fact to be decided by the Board of Registrars, dependent upon the intention and the acts of the elector in each particular case.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of January 3, 1938, which follows:

"There seems to be some disagreement among the Board of Registrars as to purging the voters list. Please give me your opinion on the following:

"A voter, landowner and taxpayer, who was born and reared in this county now lives with his daughter in an adjoining County. He makes regular visits to look after his plantation in this county.

"This voter wants to continue to vote in this county. Under the facts as stated, have the Registrars the right to strike his name from the voters list in this County?"

The Board of Registrars in each county is charged with the duty of purging the registration list of the county from time to time in accordance with the provisions of the appropriate sections of Article 3, Sections 370 through 404, as subsequently amended, of the Code of Alabama of 1923. Section 392 of this article is the section which provides the time for purging the registration list and sets out what names should be purged therefrom. As last amended by Act No. 460, General Acts 1935, page 989, approved September 13, 1935, it reads as follows:

"392. TIMES FOR PURGING LIST OF REGISTRATION. The board of registrars shall meet in each county on the first Monday in January, 1936, and every two years thereafter, for purging the registration list, and may continue in session one week. The names of those who have died, become non-residents of the State, become insane, and been so declared by inquisition of lunacy, or who have been convicted of any offense mentioned in Section 182 of the constitution, since being registered, or otherwise disqualified as electors under the provision of the constitution, and any names which may have been fraudulently entered on such list, shall be stricken from the registration list. Any

member of the board of registrars who neglects or willfully refuses to perform the duties herein required of him shall be guilty of a misdemeanor and on conviction, shall be punished by a fine of not more than Five Hundred Dollars (\$500.00), and may also be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than six months. That when said Board of Registrars have sufficient evidence furnished them that any elector has permanently moved from one precinct to another in any County said Board of Registrars shall transfer the name of such elector to the registration list of the precinct to which such elector has moved."

Consequently, the Board of Registrars has the power to purge, and is charged with the duty of purging, the registration list of the county in accordance with the statutory provisions above cited.

It will be noted that, among others, Section 392, as amended, *supra*, provides that the registrars shall strike from the registration list the names of those who have become "otherwise disqualified as electors under the provisions of the constitution." It is my opinion that a person who has changed his legal residence from the county in which he is registered to another county has thus become otherwise disqualified as an elector, under the provisions of the constitution, in the county where he is registered and from which he removed his residence. This for the reason that Section 178 of the Constitution provides, in part, as follows:

"To entitle a person to vote at any election by the people, he shall have resided in the state at least two years, in the county one year, and in the precinct or ward three months, immediately preceding the election at which he offers to vote, and he shall have been duly registered as an elector. * * *"

A person who has removed his legal residence from a county in which he had formerly resided and in which he was registered as an elector, could not possibly comply with the provision requiring that he reside in the county one year immediately preceding the election at which he offers to vote. Consequently, he would not be entitled to vote in an election in the county from which he had removed and in which he had been registered as an elector.

When this is considered in connection with the provisions of Section 385 of the Code of Alabama of 1923 providing that no person heretofore registered and no person hereafter registered shall again be required to register unless he or she changed the county of his or her residence, as that section was construed by the Supreme Court of Alabama in the case of *Shepherd v. Saratin*, 185 Ala. 439, holding that under said section a registered voter who changes his legal residence from one county to another must register in the county of his new residence in order to be entitled to vote therein, the conclusion is inescapable that a person who has removed his legal residence from the county in which he formerly resided and was registered has become otherwise disqualified as an elector in the county in which he was registered and from which he removes, under the provisions of the constitution. Consequently, his name should be stricken from the registration list of said county by the Board of Registrars in accordance with the provisions of Section 392, as amended, *supra*, and the other appropriate sections of Article 3, *supra*.

The question of whether or not the particular person described in your letter of inquiry is now a legal resident of Green County or of some other county is a question that addresses itself to the Board of Registrars of your county and, therefore, we decline to render an opinion thereon. However, for your information on this subject, we quote at length from the decision

of the Supreme Court of Alabama in the case of **Pope vs. Howle, Allen vs. Cooper**, 149 So. 222, which is an excellent statement of the principles of law to be followed in such a case:

"We come now to the paramount and determining question of domicile of the two classes of voters that were here denied the right of franchise. **Domicile of the elector is a mixed question of law and fact, dependent upon the intention and acts of the elector.** Cases illustrating such fact which may be consulted with profit are: In *Holmes v. Holmes*, 212 Ala. 597, 599, 103 So. 884, the law of domicile is thus stated: 'A domicile once acquired is presumed to continue until a change, *facto et animo*, is shown. *Bragg v. State*, 69 Ala. 204. If there was a change, there must have been both an abandonment of his former domicile with no present intention to return, and the establishment of another place of residence with intention to remain permanently, or, at least, for an unlimited time; the former may be inferred from the latter. *Allgood v. Williams*, 92 Ala. 551, 8 So. 722; *Caldwell v. Pollak*, 91 Ala. 353, 8 So. 546; *Young v. Pollak*, 85 Ala. 439, 5 So. 279; *Merrill v. Morrissett*, (76 Ala. 433), *supra*.'

"See, also, *Lucky v. Roberts*, 211 Ala. 578, 100 So. 878; *Talmadge's Adm'r v. Talmadge*, 66 Ala. 199; *Frederick v. Wilbourne*, 198 Ala. 137, 73 So. 442; *Black v. Pate*, 136 Ala. 601, 607, 34 So. 844; *Griffin v. Wall*, 32 Ala. 149; *Boyd v. Beck*, 29 Ala. 703; *State v. Hallet*, 8 Ala. 159.

"The effect of these cases may be thus stated: When the fact of the legal residence of a citizen is once established, such fact of residence is presumed to continue, and this presumption prevails until it is established by the evidence that he has elected to or has established a residence at or in another place. It may further be stated that, while the determination of the place of legal residence of a citizen presents a question of fact, yet, in determining that fact, the intention of the citizen is entitled to and must be given due consideration in connection with his relevant acts. It is this combined result of intention and acts—speaking for the voter of his actual domicile, official residence as a citizen and as an elector, seeking to cast or undertaking to cast his vote—that determines the right to vote in such precinct." (Emphasis ours).

Thus, it can be clearly seen that the question of one's residence for the purpose of becoming or remaining a registered elector is a mixed question of law and fact to be determined by the Board of Registrars, dependent upon the intention and acts of the elector.

For your further information on this subject it might be well to here quote the provisions of Section 366 of the Code of Alabama of 1923 in regard to temporary absence of a person from his place of residence:

"366. Residence not acquired or lost by temporary absence.—No person shall lose or acquire a residence either by temporary absence from his or her place of residence without the intention of remaining, or by being a student of an institution of learning, or by navigating any of the waters of this state, the United States, or the high seas, without having acquired any other lawful residence, or by being absent from his or her place of residence in the civil or military service of the state, or the United States; neither shall any soldier, sailor, or marine, in the military or naval service of the United States, acquire a residence by being stationed in this State."

We trust that the above discussion of the law on this subject will enable your Board of Registrars properly to determine whether or not the person described in your letter of inquiry should or should not have his name stricken from the list of registered electors of your county.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 9, 1938

Dr. Daniel T. McCall, President,
Mobile County Revenue and Road Commissioners,
Mobile, Alabama.

Counties—Have authority to furnish sheriff with machine guns, gas guns and ammunition in connection with the performance of duties of said office.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of December 23, 1937, which is as follows:

"Please furnish me with your opinion on the following:

"1. Can the Board of Revenue and Road Commissioners of Mobile County, Alabama, furnish the Sheriff with machine guns, gas guns and ammunition?

"The Sheriff of this county is on a fee basis and therefore I can't feel that the county can legally furnish him with the above."

I am of the opinion that your inquiry should be answered in the affirmative provided said machine guns, gas guns and ammunition are used in the performance of the official duties of the sheriff's office.

Under Section 5135 of the Code of 1923, the sheriff is the principal conservator of the peace in the county and it is his duty to suppress all riots, unlawful assemblies and affrays.

The duties of the sheriff are set out in Section 10189, Code of Alabama, 1923. Subsection 4 of said section provides as follows:

"Section 10189. DUTIES OF SHERIFF.—It is the duty of the sheriff—

* * * *

(4) It shall be the duty of sheriffs in their respective counties by themselves or deputies to ferret out crime, to apprehend and arrest criminals, and in so far as within their power to secure evidence of crimes in their counties, and to present a report of the evidence so secured to the solicitor or deputy solicitor of the county, or if there is an inferior or special statutory court within the county in which a solicitor prosecutes criminal cases, then to such solicitor."

Also under Sections 10190 and 10191 certain investigations are authorized and the expenses of same are paid by the county.

From the above, it appears that certain duties are imposed upon the sheriff in connection with the enforcement of the criminal laws of the State of Alabama.

Since these duties are imposed upon the sheriff, it follows that the county would be authorized to make reasonable expenditures in connection therewith. In other words, such expenditures, although not directly authorized, would be proper by necessary implication.—*Ensley Motor Car Co. v. O'Rear, Treasurer*, 196 Ala. 481, 71 So. 702; *Bice v. Foshee*, 19 Ala. 421, 97 So. 764. In the enforcement of such duties the use of the machine guns, gas guns and ammunition would properly and probably be essential in some instances and, in my judgment, the county governing body is authorized to furnish the sheriff with same. This is particularly true in this modern day of gangsters and organized crime.

This holding is in line with an opinion rendered to the Solicitor of the Eleventh Judicial Circuit, Florence, Alabama, on July 31, 1933. (Biennial Report of Attorney General, 1932-1934, p. 324), wherein it was held that the county can legally pay for the chemical analysis of alleged prohibited liquors under Section 10190 and 10191 of the Code of Alabama, 1923.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 10, 1938.

Hon. T. C. Garner,
County Treasurer,
Jefferson County,
Birmingham, Alabama.

Counties—

(1) It is the duty of county governing body to prepare budget. Treasurer may prepare supplemental budget in accordance therewith, setting up proposed appropriations and the order of priority for payment.

(2) Claims set out in Section 231, Code of 1923, as subsequently amended, are preferred. Other involuntary obligations of county are then payable, and lastly voluntary obligations are paid. Claims of same special class are payable pro rata if funds are insufficient to meet payment in full.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of February 4, 1938, which is as follows:

"Act approved June 6, 1935 Page 162, Acts of 1935, amending Section 231 of the Code of 1923 sets up preferred claims and other order of the priority for Jefferson County. The last sentence of said act was as follows to wit:

"For the payment of the above recited claims, in the order named, it shall be the duty of the County Treasurer or custodian of the County funds to set apart a sufficient fund from the moneys of the County and

he and his official bond shall be held liable for a failure so to do, insofar as the funds of the County made is possible for him so to do.'

"Please advise me on the following questions:

"(1) To carry out the provisions of this act, is it the duty of the County Treasurer to prepare a budget showing the amount of estimated receipts and disbursements?

"(2) Preparing the budget, should the County Treasurer set up the claims mentioned in said act as preferred claims?

"(3) If there is insufficient funds to pay the preferred claims, should the County Treasurer prorate the amount of revenue so that each claim could share alike in the disbursements?

"(4) If there is sufficient funds to pay the preferred claims in full, and the balance remaining is insufficient to pay other claims, should said balance be prorated equally among the other claims?"

Before specifically answering your inquiries, wish to state that Section 231 of the Code of 1923 has been twice amended. The first amendment was by General Acts 1935, p. 162. General Acts 1935, p. 990, amended Section 3 of said Code section as amended by General Acts 1935, p. 162.

In answer to your first inquiry, it is my opinion that the duty of adopting a budget system for conduct of the affairs of a county rests on the county governing body.—Section 6789, Code of 1923; **Rhodes v. Marengo County Bank**, 205 Ala. 667, 88 So. 850; **Quarterly Report of Attorney General**, Vol. 1, p. 56. The County Financial Control Act (General Acts 1935, p. 803) has no application to Jefferson County. However, the Uniform System of Accounting and Reporting of County Offices Act (General Acts 1935, p. 43) is applicable to all counties of this State. Under Section 6789, supra, Jefferson County governing body is required to adopt a budget system for the county.

After the budget has been adopted by the county governing body, the County Treasurer may prepare a supplemental budget in accordance therewith. The estimated disbursements are already set up. He should set up a list of the estimated receipts for comparison.

I am of the opinion that your second inquiry should be answered in the affirmative. Section 231 of the Code of 1923, as subsequently amended, sets out certain preferred claims of the involuntary class, and must be paid first in order of their priority. It is necessary to set up the claims mentioned in said section as subsequently amended, in order that these classes of claims may be properly paid in the order of their priority.

Your third and fourth inquiries will be answered together for convenience.

Legitimate county debts or obligations are of two general classes; namely, (1) those which are prescribed and imposed by law and are purely involuntary as to a county, and (2) those which are merely authorized by law, and may be assumed by the county when the condition of the county treasury will admit of it—**Quarterly Report of Attorney General**, Vol. I, p. 56, supra, **Biennial Report of Attorney General**, 1930-1932, p. 1057. See also **Brown v. Gay-Padgett Hdw. Co.**, 188 Ala. 423, 66 So. 161.

The claims set up in Section 231 of the Code of 1923, as subsequently amended, are claims of the first general class, as above defined. It is a

division of claims of the first general class as to the order of priority of payment of claims of that class. It is not all inclusive as there may be other claims of the first general class than those therein enumerated.

Claims of the type set out in Section 231, *supra*, as amended, are payable in the order of the priority therein set out. The claims of subdivision 1 of said section, as amended, should be paid in full before payments are made of claims of subdivision 2. The claims of subdivision 2 are made before claims of subdivision 3, and so on. All claims of each separate subdivision are proratable accordingly. If there are insufficient funds to pay all preferred claims under Section 231, as amended, payment should be made in this manner.

After the preferred claims set up in Section 231, as amended, have been met, the next order of priority are those other claims of the general class 1 (involuntary obligations) as above defined. These claims are proratable if there are not sufficient funds to meet them in full.

If all claims of the general class 1 (involuntary obligations) are paid, then the claims of general class 2 (voluntary obligations) as above defined, can be paid. If there are not sufficient funds to pay all of these involuntary obligations, then they are paid *pro rata*.

It is impossible to set up a budget that will be workable to the nth degree. Certain obligations arise that cannot be foreseen. The anticipated revenues may either be more or less than anticipated. Therefore, the budget adopted necessarily is elastic and may be amended from time to time by the county governing body to meet existing conditions when absolutely necessary.—**Quarterly Report of Attorney General, Vol. VIII, p. 111; Quarterly Report of Attorney General, Vol. VII, p. 199.**

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 14, 1938.

Hon. S. M. Cobb,
Clerk of the Circuit Court,
Wilcox County,
Camden, Alabama

1. Where suit is brought for a minor by a next friend, such next friend is responsible for the costs, where the plaintiff fails in suit.
2. Execution cannot be issued against a minor.
3. Execution may be issued against a non-resident to be levied on property within this State. Where non-resident has no property in this State, then suit must be brought against the non-resident on the judgment of this State, in the State of his residence.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter in which you request my opinion as follows:

"Please give me an opinion to the following questions:

1. When a suit is filed by a plaintiff, as next friend for a minor, is the party plaintiff (next friend) responsible for the cost when the plaintiff fails in the suit?
2. Can I issue execution against a minor.
3. Can I issue execution against a non-resident?"

My answer to your first request is in the affirmative. **Hughes v. Hughes**, 44 Ala. 698; **Smith v. Gaffard**, 33 Ala. 168. These cases are old but they seem to have settled the law on this question, as they, so far as I can ascertain, have not been disturbed. The Supreme Court of Alabama seems to have confirmed the holding in the above cases in the case of **ex parte Bennett**, 231 Ala. 223.

As to your second request our answer is in the negative, as an infant cannot bring suit in his own name, unless his disabilities have been removed, but may bring suit by next friend, and on the cases cited above, the next friend is liable for costs.

My answer to your third request is in the affirmative; that is, if the non-resident has property in the State subject to execution, otherwise suit on judgment obtained here in Alabama would have to be brought against the defendant in the State of his residence and judgment there obtained.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 15, 1938

Hon. Matt A. Boykin,
Judge of Probate,
Mobile County,
Mobile, Alabama.

Taxation—Invalid Assessments—Redemptions from invalid assessments—

1. Assessment of real property to the estate of the deceased owner is void.
2. Assessment of real property, title to which is vested in certain designated beneficiaries of a will, is void if made in the name of and to an executor who has not intercepted said property for payment of debts lawfully claimed against the estate of testator.
3. Real property that has been sold for payment of taxes is not the subject of redemption if the assessment and sale thereof were void.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry as follows:

"I wrote you on December 31st., 1937 relative to Judge Joseph N. McAleer, as Attorney for Miss Margaret E. Finch and Mrs. Emma C.

Harris, calling on me on that date desiring to redeem from the tax sale in 1933 for the taxes of 1932 certain property assessed to 'Estate of R. A. Finch' and another assessment against 'Estate of R. A. Finch and Lewis W. Harris.' Miss Margaret E. Finch is the owner of all real property assessed in 'Estate of R. A. Finch' and Mrs. Emma C. Harris is the owner of only one-half of the interest in the assessment to the 'Estate of R. A. Finch and Lewis W. Harris.' I desire to withdraw my letter of December 31st., 1937 and my supplemental letter of January 28th, 1938, and to re-state to you the condition of all sales of property belonging to R. A. Finch and property jointly owned by R. A. Finch and Lewis W. Harris, both deceased many years ago. At the time I wrote you my attention was not called to the second sale of the respective properties.

"I have checked the records and find that there was a sale of each one of the above assessments in 1933 for the 1932 tax assessment as above set out, which sale was had under a decree of sale by the former Judge of Probate, Price Williams, now deceased, and that the notice of sale was regularly advertised and same were bid in by the State, as set out in the Tax Sales Book for the year 1932, but the description of the property and the amount of the taxes, costs of sale, etc. in the Tax Sales Book has an ink line run through the same. The Assessment Book for 1932 containing the above two assessments is marked with a stamp in red ink 'Sold for 1932 taxes' and the word 'Error' in lead-pencil is marked over the same.

"There is also a tax sale in 1936 of both of the above described properties, one of the assessments reading 'Gregory B. Finch Exct. for Estate R. A. Finch, and the other 'Gregory B. Finch Exct. for Estate R. A. Finch & Lewis M. Harris,' which was an assessment made as an Escape for the years 1932-33-34 and '35, and sold in 1936.

"Judge McAleer offered to redeem all of the properties under the sale of 1932 in order to save the penalties and interest thereon under the Act of the Legislature. He stated that Mr. Tcuart, the Tax Assessor, had agreed on what was the fair assessed value of the property for the years 1933-34-35-36 and '37, and that Mr. Touart had written to Mr. Henry Long giving him this information and stating that in his opinion the assessment was excessive. Judge McAleer stated that at the time he had Mr. Touart write this letter to Mr. Long he knew nothing of the sale for 1932, and upon discovering this he took the matter up with Mr. Curry and Mr. Carleton, both in the State Tax Commission Office, and they had informed him that no redemption could be made under the 1932 tax sale. I stated to him that I had some doubt as to whether or not he could redeem this property under the tax sale of 1932, but that I would write the Attorney General for an opinion on this matter.

"The will of Lewis W. Harris was admitted to probate on September 10th., 1914, in which—after giving certain bequests in money—he gave the residue to his wife, Emma Carley Harris. (Will Book 10, page 45). Letters testamentary were issued to Richard A. Finch as Executor in accordance with said last will and testament.

"The will of Richard A. Finch was admitted to probate on December 7th., 1923, and letters testamentary were issued in accordance with said will to Gregory B. Finch on the same date. (Will Book 12, page 210). In the will of Richard A. Finch he gave his entire estate, share and share alike, to his seven children. Petition was filed by Gregory B. Finch for the probate of his father's will, in which petition he set out that his father was a widower at the time of his death and left seven

children, namely: Gregory B. Finch, Cecilia M. Finch, Margaret E. Finch, Richard A. Finch, John T. Finch, Mary A. Finch and Albert F. Finch.

"There was a proceeding filed for the sale of the real property of Richard A. Finch, dec. for division and payment of liens, the petition being filed by Gregory B. Finch individually and as Executor Estate R. A. Finch, deceased, and Richard A. Finch, against Cecilia M. Finch, and Margaret E. Finch, Mary A. Finch, Albert F. Finch, and Estelle M. Finch, widow of John T. Finch, and his seven minor children namely:—John T. Finch, Jr., Mary Ann Finch, Estelle Finch, Elsie Finch, Richard A. Finch, Elizabeth Finch and Frances Finch, setting out in the petition that Gregory B. Finch, Cecilia M. Finch, Margaret E. Finch, Richard A. Finch, Mary A. Finch and Albert E. Finch each own an undivided one-seventh interest in the real property and that the seven minors, subject to the dower of their mother, Estelle M. Finch, each own an undivided one-forty ninth interest therein; and the petition prays for the sale of the property for division and the payment of lien claims. Subsequently the petition was amended so as to pray for a sale for division, subject to liens, and decree confirming the sale of the real property to the purchaser, Margaret E. Finch, was rendered on November 25th., 1936, and conveyance was made to her by the Commissioner and was filed for record on April 15th., 1936, and recorded in Deed Book 265 N. S., p. 170.

"I would respectfully request that you give me an opinion as to whether or not the purchaser has a right to redeem under either of said tax sales, and if so under which one.

"I am giving this letter to Judge McAleer, at his request, in order that he may enclose the same with a letter that he is going to write you on this subject."

Also, reference is made to the letter of Mr. H. M. Touart, Tax Assessor, Mobile County, Alabama, giving additional facts, and which are to be considered in connection with your inquiry, as follows:

"At the request of Judge Joseph N. McAleer I am writing you relative to the assessments of real property formerly belonging to Richard A. Finch and jointly to Richard A. Finch and Lewis W. Harris.

"There was an assessment made for the year 1932 as follows: 'Estate of R. A. Finch,' and the other assessment to 'Estate of R. A. Finch and Lewis W. Harris.'

"There was a decree of sale under these two assessments, and advertisement, and a sale to the State, and in this Tax-Sales Book for sales of 1932 both of these sales are marked out in ink with an X.

"There was another assessment made in 1935 against these respective properties as follows:

" 'Gregory B. Finch Exct. for Estate R. A. Finch,' and the other assessment to

" 'Gregory B. Finch Exct. for Estate R. A. Finch & Lewis W. Harris,' as an Escape for the years 1932-33-34 and '35, and regularly advertised and sold under the above assessments and bid in by the State.

"I am turning this letter over to Judge McAleer to mail to you, at his request, as he states to me that he is writing you a letter relative to this matter and desires both letters to reach you at the same time."

The assessment of and for the 1932 taxes as outlined in the aforequoted letters was void and does not support a valid sale of the assessed property for the payment of taxes.

The Supreme Court of Alabama has several times held that an assessment of property to the estate of a deceased owner is without lawful attributes. A recent case is that of **Henderson v. Simmons**, 174 So. 491, in which the Court, speaking through Justice Knight, said as follows:

"A valid assessment of the property is indispensable to give the probate court jurisdiction to declare a lien and decree a sale for the unpaid taxes. Lands cannot be assessed for taxation as the property of a deceased owner, or of his estate, and a sale founded on such an assessment is void, a mere nullity, and a purchaser at such a sale acquires no title. **Jackson v. King**, 82 Ala. 43, 3 So. 232; **Scott v. Brown** 106 Ala. 604, 17 So. 731."

In determining the validity of the second assessment for 1932-33-34 and 1935 taxes, I deem it advisable to make brief reference to certain facts which I conclude from the above letters to be as follows: The Tax Assessor assessed the property, the subject of your inquiry, in the representative name of and to the executor, who had never intercepted the land for the payment of debts, although he did join with other complainants in a bill to sell the property for division among the joint owners, subject, however, to certain liens thereon. The property was willed to certain designated beneficiaries.

Section 31, Revenue Act of Alabama, 1935, makes it "the duty of every person in every election precinct * * * to render to the assessor under oath a full and complete list of all property of which he was the owner, or in which he had any interest whatever, or of which he was the trustee or agent, on the first day of October of that year."

Justice Somerville, speaking for the Supreme Court of Alabama in the case of **State v. White Furniture Company**, 206 Ala. 575, after referring to Section 44, Revenue Act of 1919, quoting therefrom identically as in the preceding paragraph, said as follows:

"So, when a statute requires that property be assessed to the owner, we think it means the general and beneficial owner—that is, the person whose interest is primarily one of possession and enjoyment in contemplation of an ultimate absolute ownership—and not the person whose interest is primarily in the enforcement of a collateral pecuniary claim, and does not contemplate the use or enjoyment of the property as such."

An executor of a will that vests title to real property in certain named persons or beneficiaries is not the owner of the real property, and in the absence of interception for payment of debts, as he is lawfully authorized to do when the personal property is insufficient therefor (**Golding v. Golding**, 24 Ala. 122; **Stovall v. Clay**, 20 So. 387), has no general or beneficial interest in such property.

Subject to payment of debts, and to the rights of the widow and/or minor children, the real property of a person dying intestate descends to the heirs who take title thereto. I quote the Supreme Court of Alabama, **Randolph v. Vail**, 180 Ala. 85, Justice de Graffenried, speaking for the court as follows:

"While our statutes confer large powers upon the administrator of an estate over the real estate of the intestate, the legal title to such lands descends to the heirs of such intestate. It is their land, subject, of

course, to the payment of the debts of the interstate if the personality proves insufficient for that purpose, and subject to certain powers which our statutes confer upon the administrator while acting as such administrator. He may rent out such lands; and if he does so he, in the performance of that act, is a trustee, and is chargeable as such trustee. He may, for certain purposes, under the orders of a court of competent jurisdiction, sell the lands; and if he does so, then in the performance of that act, he is a trustee, and is chargeable as such. For this reason it has been many times held that the purchase by an administrator at his own sale of the lands of his intestate is voidable at the option of the cestui que trust, and will be set aside by a court of equity if application for that purpose is made within a reasonable time.—James v. James, 55 Ala. 525.”

There is a parallel of title in one who takes absolutely through a will and in one who inherits the fee from a person dying intestate. In either case, an administrator or executor has the lawful right to intercept the real property for payment of debts.

The mere existence of liens on the real property of the estate does not give the executor or administrator a lawful right to intercept such property. The debt which the lien secures may not be a lawful charge against the estate because it is barred by the statute of limitations or not properly filed in the manner and within the time required by law. Other statutory restrictions or mandates could bar the debt as a valid claim against the estate.

Concluding, as I do from the aforequoted letters, that the executor has never intercepted the real property for payment of debts, and also that the property was willed to certain designated beneficiaries, it is my opinion that the second assessment was void and the sale thereunder a nullity.

Since both sales are invalid, a redemption therefrom will not lie. Section 268 of the Revenue Act of 1935, and prior laws in force since 1932, authorizing redemption from tax sales, presuppose a valid assessment and sale. In cases of void tax sales, privileged parties are precluded from asserting a right of redemption to which they would have been entitled had the property sought to be redeemed been validly sold.

I premit discussing the validity of assessment of real property in the representative name of and to an executor or administrator who has intercepted the assessed property for payment of debts. This question is not presented in your inquiry.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 17, 1938

Hon. J. W. Hamilton,
Tax Collector,
Jefferson County,
Birmingham, Alabama.

Homestead Exemptions—Time of forfeiture thereof—Crediting exemption certificates.

1. Act of the tax collector in levying an execution on personal property, or in filing with the probate judge a report of delinquency, for the collection of ad valorem taxes, is an act that invokes the machinery of the State for collection of taxes so as to conclude the time for claiming homestead exemption from the payment of 1936-1937 ad valorem taxes for the use of the State.

2. Failure of an exemptioner to file his certificate of credit for lawful homestead exemption with the tax collector before the machinery of the State is invoked to collect his taxes, does not forfeit such exemption, if the certificate was issued before the aid of such machinery is invoked.

3. Before invoking the aid of the machinery of the State for foreclosure of exemptioner's property for the payment of taxes, the tax collector is lawfully authorized to procure from the tax assessor a duplicate credit certificate lawfully issued for homestead exemption and properly to credit the amount thereof before proceeding with foreclosure.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry as follows:

"Under date of October 22, 1937, in your opinion to the Hon. O. L. Bethune, Tax Assessor of DeKalb County, you held that a taxpayer could assert his claim for and be given credit for his homestead exemption before the tax collector invokes the machinery of the state to enforce tax collections.

"To clarify this situation I am asking for your opinion on the following questions:

"First, what act of the tax collector invokes the machinery of the state to enforce the collection of taxes?

"Second, if a taxpayer fails to file with the tax collector the certificate of credit given him by the tax assessor before the machinery of the state is invoked does he forfeit his right to the exemption?

"If your opinion on the above question is a negative one am I authorized to give the taxpayer's account credit for the exemption due him upon information furnished me by the tax assessor, by delivering to me the copy of the exemption certificate? If so, shall I certify to the Probate Judge on March 1 in my list of delinquents, as covered in Section 214, 215, 216, and 217 of the 1935 Revenue Bill, the amount of taxes due, less the amount of exemption given, and shall this amount be embraced in the citation, on the Probate Judge's docket, in the Probate Judge's decree, and in the advertising of lands for sale, and in the sale certificate issued to the purchaser of the lands for taxes?"

Answering your first question, it is my opinion that the act of the tax collector in levying an execution for the purpose of collecting taxes, as authorized by Section 170 (p. 339), Revenue Act of Alabama, (General Acts of Alabama, 1935, p. 256) is an act that invokes the aid of the machinery of the State of Alabama for collection of taxes, and concludes the time within which the exemptioner whose property is levied upon may claim his homestead exemption from the payment of State taxes for the year 1936-1937.

The filing of a report of delinquency with the probate judge, as authorized by Section 216, Revenue Act of Alabama, (General Acts 1935, p. 256) is another act on the part of the tax collector invoking the aid of the machinery of the State of Alabama, for the collection of taxes and which marks the time within which such delinquent taxpayer, whose property is affected, must file his claim for homestead exemption. Either of these two acts definitely sets in motion the machinery of the State for foreclosure of a tax lien, and concludes the right of an exemptioner to claim homestead exemption from payment of State taxes. Reference is made to an opinion of this office dated October 22, 1937, addressed to Hon. O. L. Bethune, Tax Assessor, DeKalb County, Ft. Payne, Alabama, Book 19A (Office Edition) p. 63.

Answering question No. 2, it is my opinion that the failure of a taxpayer or exemptioner to file his lawful certificate of credit for homestead exemption with the tax collector before the machinery of the State is invoked to collect his taxes, does not work a forfeiture of his homestead exemption, provided such certificate of credit was issued before the machinery of the State was invoked to collect the taxes.

In an opinion of this office to Hon. T. L. McKee, Tax Collector, Chilton County, Clanton, Alabama, dated September 23, 1937, reported in Quarterly Report of Attorney General, Vol. VIII, p. 292, this office held that, "It is the duty of the tax collector to give the taxpayer the benefit of the exemption which the Legislature granted and to correct the amount of the certification by crediting the taxes of such taxpayer in an amount equal to that certified by the tax assessor as shown on the original certificate of credit, or on a duplicate thereof but within lawful limits." The tax collector, therefore, has a right to correct his abstract by crediting the amount of the homestead exemption as evidenced by a lawful certificate of credit issued by the tax assessor. The tax collector is lawfully authorized to procure a duplicate of such credit certificate and to credit the amount thereof.

You would have no lawful right to include in your report of delinquency an amount in excess of the tax due after lawful credit has been given as aforesaid.

This opinion is restricted to taxes for this tax year, 1936-37.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 19, 1938

Hon. Wm. W. Hill,
Probate Judge,
Montgomery, Alabama

Motor Vehicles—License Tax

1. Ambulances, hearses and taxicabs not taxed on monthly declining basis.
2. Automobile for private use brought into Alabama after November 15 in any tax year, by one who has recently taken his residence in state is taxable on monthly declining basis.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"Schedules 158.1 and 158.5 of Section 348 of the Revenue Act of 1935 are confusing inasmuch as they apply to Motor Vehicles not specifically mentioned in these two sections; that is, Automobiles for private use and trucks are specifically mentioned, but the section is silent as to ambulances, hearses and taxis, and we would like to know if these licenses should be sold on the monthly declining basis under this law.

"There is one more question that we would like cleared: a resident of another state moves into Alabama in the month of August, and Alabama law provides that he must purchase an Alabama Tag. Does he purchase a tag on the monthly declining basis or must he purchase a six months tag?"

Your first inquiry must be answered in the negative. Quarterly Report of the Attorney General, Vol. I, p. 134. The Revenue Act of 1935, Schedules 158.1, as amended by Acts of the Extra Session 1936-37, p. 86, and 158.5, as amended by Acts of the Extra Session 1936-37, page 108, do not purport to deal with taxicabs, ambulances or hearses. They are taxed by Schedules 158.3 and 158.4, respectively, of the Revenue Act of 1935. And in neither of the last cited Schedules is provision made for payment of the tax on a monthly declining basis.

Answering your second question, it is my opinion that the automobile for private use, belonging to one who moves into the State of Alabama after November 15 in any tax year, is taxed on a monthly declining basis, as is provided in the Revenue Act of 1935, Schedule 158.1, as amended by Acts of the Extra Session, 1936-37, page 86. The amended schedule provides:

"Schedule 158.1. 'PRIVATE CARS': The following license and registration fee shall be charged on automobiles and motor cars kept for private use: (a) For each automobile or motor car weighing: 2,000 pounds or less—\$5.00 (b) More than 2,000 pounds and not exceeding 2,500 pounds \$9.00 (c) More than 2,500 pounds and not more than 3,250 pounds—\$13.00 (d) More than 3,250 pounds—\$18.00. Provided, however, that for new and used automobiles acquired subsequent to November 15th in any tax year these licenses shall be purchased on a monthly declining basis of one-twelfth (1/12) or for each month of the tax year and that the purchaser shall only buy a license for the then remaining months of the tax year. In figuring the license on a one-twelfth (1/12) reduction for each month, the amount of any fraction shall be figured to the nearest ten (10c) cents

above the fraction thereof. But in no event shall the price of license tag be less than two dollars (\$2.00)."

True, under Schedule 158.13 of the Revenue Act of 1935, automobiles acquired or brought into the State after April 1, or being owned within the state but not used or operated between October 1 and April 1, were taxed on the basis of one-half of the license provided by law plus \$1.00. At that time the monthly declining rate of tax applied only to new automobiles for private use. Quarterly Report of the Attorney General, Volume I, page 134. By the amendment, supra, the monthly declining rate is applicable to new and used automobiles.

I do not believe that the Legislature intended to levy a greater tax for the identical privilege against a resident of Alabama who had recently removed from another state than is levied against residents of longer standing. The license tax levied on motor vehicles contemplates that the owner pays for the use of the highways. *Williams v. Albany*, 216 Ala. 408. The monthly declining tax scheme is based on the quantum of such use. The new resident who brings his automobile into Alabama from the state of his former residence ought not to be required to pay more for the privilege of using the highways than residents of long standing. I do not think that the Legislature undertook to make such a discrimination.

To the extent that the former opinions of this office appearing in Quarterly Report of the Attorney General, Vol. VI, p. 97 and Vol. VII, p. 45 tend to militate against the conclusion herein announced, the same are amended to conform herewith.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 21, 1938.

Hon. Frank J. Mizell,
Solicitor 22nd Judicial Circuit,
Florala, Alabama.

1. It is not illegal for a son, nephew, or other relative within the third degree of a member of the Commissioner's Court to hold the office of County Treasurer.

2. A member of the Court of the County Commission is prohibited from voting for his son, nephew, or other relative by blood or marriage within the fourth degree to hold the office of County Treasurer.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt of your letter, a pertinent part of which is as follows:

"I do not recall bothering or asking your office for more than one opinion in the past three years, but I am herewith submitting two questions which are of importance, and which I would greatly appreciate your answering by return mail or just as soon as you can.

Question one. Is it illegal for a son, nephew or other relative within the third degree of a County Commissioner, either, to hold the office of County Treasurer; or is such relationship a disqualification to hold such office?

Question Two. As a matter of law is a County Commissioner prohibited from voting for a son, nephew, or other relative within the third degree for the office of County Treasurer.

These questions have been referred to me by the County Commissioners of this County, and they are very desirous of having this information just as soon as possible during this week."

I wish to call your attention to Section 5076 of the Code of Alabama of 1923, which Section is as follows:

"Letting contracts to relatives or employing relatives of commissioners; penalty for.—Any member of any commissioners' court or board or revenue who shall award any contract in which the county of such commissioner or member of board of revenue is interested to any person related, either by blood or marriage within the fourth degree to such commissioner or member of board of revenue, or who shall employ any such relative to do any work for said county, or to act as agent for any such member in any work in which such county is interested, shall be guilty of misdemeanor and, on conviction, shall be fined not less than ten dollars nor more than one hundred dollars."

The Supreme Court in the case of Garrison against Sommers 223 Alabama 17, 134 Southern 675, in construing the above quoted provision of law held that the mere relationship of a person to a member of the commissioners' court does not in and of itself prohibit such person from working for the county. Therefore, your first inquiry must be answered in the negative.

In the same opinion above referred to, the court held, however, that a member of the commissioners court who voted for or took any part in the employment of a relative within the degree prohibited by said Section 5076, supra, would be guilty of a misdemeanor. Therefore, your second inquiry must be answered in the affirmative.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 21, 1938.

Hon. J. F. Laseter,
Judge of Probate,
Barbour County,
Clayton, Alabama

Probate Judge—Federal Deed Tax—Need not require Federal Revenue Stamp on conveyances before accepting the instrument for recording.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of January 27, 1938, in which you request my opinion as follows:

"Please give me your opinion as to whether or not a Probate Judge shall require the Federal Revenue Stamp on conveyances before accepting the instrument for recording."

In my judgment, the Probate Judge need not require the Federal Revenue Stamp on conveyances before accepting an instrument for recording. The Federal Tax is levied under title 26, Section 906 (a) of the United States Code Annotated, which does not attempt to affect the recording of the instruments taxed.

Under previous enactments, the Federal Government has provided that unstamped instruments shall not be subject to record. However, even under provisions the courts have held that there was no prohibition against the State in accepting instruments for recording. See note to **Garland V. Gaines**, 84 Am. St. Rep. 193; **Sowell v. Rankin**, 82 So. 317. In the Sowell case the Supreme Court of Mississippi says:

"The formalities to be observed in the making and recording of a deed to real property is a matter for regulation by the state in which the property is situated, and not by the general government, so that the United States internal revenue laws providing that unstamped instruments in writing shall be invalid and not subject to record have no application thereto."

In **People v. Frome**, 54 N. Y. Sup. 833, 834, the Supreme Court of New York, speaking to a similar question, said:

"* * * * The responsibility of seeing that the proper stamp is affixed rests upon the parties to the instrument; and the register is no more required to determine the validity under the United States revenue law of an instrument offered for record than he would be to determine whether a deed offered for record contravened some statute of the state, or was offered for the purpose of defrauding creditors, or, for any other reason, was invalid and void. To hold that such a duty rested upon the register would be to constitute him a judicial, instead of a ministerial, officer. The relator having complied with the provisions of the law of this state as to the statement which he desired to have filed, and having tendered the necessary fees for such filing, it was the duty of the register to accept the same for recording."

In **Moore v. Quirk**, 105 Mass. 49, 51, we find the following:

"The mortgage was recorded as required by the statutes of the commonwealth. Gen. Sts. c. 151, Sections 1, 3. The clause of the internal revenue act, which provides that instruments not stamped as therein required shall not be recorded, cannot be construed as prohibiting the performance by the officers of the Commonwealth of the duties imposed upon them by its statutes, but must be limited in interpretation and effect to records required or authorized by acts of congress, for the same reasons upon which the prohibition in the same clause against giving unstamped instruments in evidence in any court has been decided to be applicable to the federal courts only, and not to extend to the state courts. **Carpenter v. Snelling**, 97 Mass. 452. **Green v. Holway**, 101 Mass. 243. **People v. Gates**, 43 N. Y. 40. **Clemens v. Conrad**, 19 Mich. 170."

The same conclusion is reached in **Stewart v. Hopkins**, 30 Ohio State 502.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 21, 1938.

Hon. Howard D. Lynes, Sheriff,
Washington County,
Chatom, Alabama

Court of County Commissioners is vested with authority to appoint janitor for courthouse, also janitor for jail.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

This is to acknowledge receipt of your letter of December 14, 1937, which is as follows:

"Under Section 211 of the Political Code of 1923 it is my duty to take charge of the courthouse and keep it and the ground attached thereto in order; and under Section 6755, sub-section (2) thereof it is the duty of the court of county commissioners to provide a janitor for the courthouse and to see that he keeps clean and in a sanitary condition the courthouse. You will please advise me whether it is within my power to appoint a janitor for the above purpose, and for the court of county commissioners to pay for same, or is the power of the court to make such appointment?"

"Now under Section 4801 of 1923 Code of Alabama I have the legal custody of the jail, which is a part of the county property and on the courthouse grounds, and under section 4868 it also my duty to keep the jail clean, etc.

"Under these sections it seems that I am the proper person to make the appointment of a janitor both for the courthouse and the jail.

"If it is my authority to hire such a janitor advise who shall prescribe his salary.

"If the court of county commissioners have the authority to appoint a janitor for the courthouse, and I have the authority to appoint a janitor for the jail who has the power of setting his wages?"

In answer to your inquiry, I am of the opinion that the Court of County Commissioners is vested with the authority to appoint both the janitor for the courthouse and the janitor for the jail. Subsection 2 of Section 6755, Code of Alabama, 1923, as amended by Act 622, Acts 1931, p. 759, provides as follows:

"It shall be the duty of the court to provide a janitor for the court-house and to see that the janitor keeps clean and in a sanitary condition all court rooms, corridors, halls and offices in the court-houses of their respective counties."

This, in my opinion, is direct authority for the appointment by the county governing body of a janitor for the court-house.

Section 4866, Code of Alabama, 1923 provides in pertinent part as follows:

"The Court of County Commissioners, Board of Revenue or City Council, shall provide adequate janitor service for, and shall enforce cleanliness in their respective jails * * *."

Therefore, it is my opinion that the sheriff is not vested with authority to appoint either the janitor for the court-house or the janitor for the jail.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 21, 1938.

Hon. Hunter Phillips,
Tax Assessor, Choctaw County,
Butler, Alabama.

Taxation—

1. Section 28 of the 1935 Revenue Act does not authorize the payment by the county of the expenses or any of them incurred by the tax assessor and/or collectors in the performance of the services required of them respectively by Sections 30 and 157 of said Act, except that, if the notices required to be published in each election precinct are made on stationery or printed blanks the county may pay for the cost of the stationery or printed blanks so used.

2. Under subsection (j) of Section 2 of the 1935 Revenue Act allowing an exemption of "two cows, two calves" a person may not claim as exempt one cow, one calf and one ox.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of January 24, 1938, which reads as follows:

"In the Attorney General's report number 4, page 47 there is an opinion, in which you state that the Tax Collectors and Assessors will have to pay for the advertisement of their rounds. That is, the notices that the law requires that we have to post, also the notice that we put in the papers. With reference to the above I invite your attention to Section number 28, of the 1935 Revenue Code. I will appreciate it very much if you will look into this matter, and advise me as to whether or not we will be able to charge this part of the expense of our round to the county.

"Please give me an opinion on the following matter, a taxpayer makes his assessment on personal property, and his return shows one cow and one calf along with other personal property, which is exempt. He also assesses one ox, on which I have charged him tax.

This taxpayer protests this, saying that he does not have but one cow and calf, and that this ox should be allowed to go as exempt. Please advise me if the ox would be taxable."

The opinion to which you refer in your letter of inquiry is an opinion to Hon. U. B. Sullivan, Tax Collector, Pickens County, Carrollton, Alabama, under date of July 17, 1936, and holds as follows:

"Tax Assessors and Collectors are not entitled to payment for expenses incident to the services required of them respectively by Sections 30 and 157 of the 1935 Revenue Act."

Sections 30 and 157 require the Tax Assessors and Tax Collectors respectively to visit each precinct of the county and to advertise these visits unless relieved of such duty by proper resolution of the Court of County Commissioners. The advertisement of these visits required to be given must be both by publication in a newspaper and by bills posted at five or more public places in each election precinct.

Section 28 of the 1935 Revenue Act to which you refer reads as follows:

"Section 28. It shall be the duty of the courts of county commissioners or boards of revenue of the several counties in this State to supply the Tax Assessor, Tax Collector and such other tax officials or agents whose duty it is to assess and value property for taxation under this Article, with all necessary books, stationery and printed blanks for the proper conduct of their several offices."

In my opinion, this section does not authorize the payment by the county of the expenses or any of them incurred by the Tax Assessors and/or Collectors incident to the services required of them respectively by Sections 30 and 157, supra, unless the notices required to be posted in each election precinct are made on stationery or printed blanks, in which case the county may pay for the cost of the stationery or printed blanks so used under the authority of Section 28, supra.

With reference to your second inquiry, it is my opinion that under subsection (j) of Section 2 of the 1935 Revenue Act, which exempts from ad valorem taxation, among other things, "two cows, two calves", a person may not claim as exempt one cow, one calf and one ox. A cow is a mature female of cattle, while an ox is the mature male of cattle without procreative capacity. The term ox is not applied to the mature female. Webster's New International Dictionary. It is a well established rule of statutory construction that statutes providing exemptions from taxation must be strictly construed in favor of the taxing authority and against the person claiming the exemption. When this general rule is considered in the light of the above definitions of the word "cow" and the word "ox", it seems very clear to me that an ox is not exempt from ad valorem taxation under the provision of the 1935 Revenue Act, supra, exempting from such taxation "two cows, two calves". This conclusion is strengthened by the fact that the exemption provides, along with the exemption of two cows, exemption of two calves, a calf being the young offspring of the cow. Webster's New International Dictionary.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 21, 1938.

Hon. Chas. W. Lee,
State Comptroller,
C A P I T O L

Ad valorem taxation—Motor Vehicles—Certificate that no tax due.

Under Schedule 158.12 of the Revenue Act of 1935, it is the duty of the Tax Assessor to ascertain whether or not ad valorem tax is due upon motor vehicle for which application is being made for license tag, and to certify the fact, if it be a fact, that no ad valorem tax is due thereon.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"In some cases an automobile is assessed and there is no tax due on same.

"Please advise me on the following questions:

"(1) Where an automobile is assessed and there is no tax due on same, should the statement showing no tax due be signed by the Tax Collector or the Tax Assessor?"

In my opinion, it is the duty of the Tax Assessor to ascertain and certify to the Probate Judge or other officer empowered by law to issue motor vehicle licenses, the fact, if it be a fact, that no ad valorem tax for the preceding year is due on a motor vehicle for which application is being made for license tag.

Schedule 158.12 (b), of the Revenue Act of 1935, provides the procedure to be followed by the applicant for a license tag. In part it provides;

The Probate Judge is authorized to issue a motor vehicle license upon a certificate of the Tax Assessor certifying that there is no ad valorem tax on said motor vehicle due for the preceding year.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 25, 1938

Hon. E. N. Blackwood,
Tax Collector,
Blount County,
Oneonta, Alabama

Taxation—Exemption of municipal property.

1. Property in Blount County owned by and in the possession of the City of Birmingham, upon which is built a dam for storage of water that is distributed in the City of Birmingham, is exempt from state and county taxes.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry of recent date as follows:

"As Tax Collector of Blount County, Alabama, I hereby request your opinion on the following:

"The City of Birmingham is the owner of certain properties in Blount County, Alabama, on which is being erected a dam for the storage of water to be transferred to the City of Birmingham for distribution in that city by it.

"Is the City of Birmingham liable to ad valorem taxes on said property which is located in Blount County?"

It is my opinion that Section 91 of the Constitution, the provisions of which are self-executing (Anniston City Land Company vs State, 160 Ala. 253, 48 So. 659), exempts from state and county ad valorem taxes the property belonging to the City of Birmingham that you mention in your aforequoted inquiry. I quote Section 91, supra, as follows:

"Section 91. The legislature shall not tax the property, real or personal, of the state, counties, or other municipal corporations, or cemeteries, nor lots in incorporated cities and towns, or within one mile of any city or town to the extent of one acre, nor lots one mile or more distant from such cities or towns to the extent of five acres, with the buildings thereon, when same are used exclusively for religious worship, for schools, or for purposes purely charitable."

The aforequoted constitutional provision does not restrict the exemption to property located within any particular area of the State of Alabama nor does it contain any restrictions as to the class of property. Also there are no limitations as to the use of the property. No real or personal property of a municipality in Alabama, in its possession, may be assessed for ad valorem taxes for the benefit of the state and county.

It is therefore, my opinion that the property mentioned in your letter is embraced in the constitutional exemption. (Quarterly Report of Attorney General, Vol. III, p. 134).

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 25, 1938

Hon. G. C. Brittain,
County Treasurer & Secretary
Board of Revenue, Calhoun County,
Anniston, Alabama

1. Prisons and prisoners—Prisoner in ill health confined to hospital under order of Circuit Judge—Guards therefor may be paid by the County under authority of Code Section 4812.

2. County Treasurer liable for paying claim where he has knowledge of facts rendering such claim invalid.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of January 4th in which you request my opinion as follows:

"As Secretary of the Board of Revenue of Calhoun County, Alabama and as Treasurer of Calhoun County, I would thank you to give me an opinion as to the following:

"A man charged with murder was injured in the fight out of which grew the murder charges. He was injured to such an extent that it was not safe to keep him in jail and he was taken to the hospital upon orders secured by the sheriff from one of the Circuit Judges of this circuit. A warrant was sworn out for him for murder and within a few days the grand jury was convened and the man was indicted for murder. He is still in the hospital. The order of the Circuit Judge authorizing or requiring the sheriff to transfer him to the hospital provided for the employment of guards to guard him while in the hospital.

"Please advise me whether or not the county can legally pay the salary or hire of these guards while guarding this prisoner in the hospital.

"Would the county be authorized to pay such guards, either under the provisions of Section 4811 of the Code or under Section 6717 of the Code as amended by the Acts of 1931, pages 66 and 67? If I as county treasurer should receive certificate of the judge showing service of bailiff, knowing that the alleged bailiff was serving as a guard for a prisoner in the hospital under the above circumstances, could I legally pay the certificate or warrant or would I be liable for such payment?

"Thanking you for an early reply, I am."

As you know a Board of Revenue is a court of limited jurisdiction. Whatever power it has must be derived from statutory enactment, and if there is no statute or construction of a statute authorizing the payment of a claim against the county, it can not be paid. **Weakly v. Henry County Treasurer**, 86 So. 46; **Mobile County v. Williams**, 180 Ala. 639.

It is my understanding from your letter that the Circuit Judge required the sheriff to transfer the prisoner in question to the hospital under the provisions of Section 4811 of the Code of 1923. This section and the following two sections provide as follows:

"4811. **Removal of prisoners in ill health.**—When the life or health of any prisoner, who is not confined under process from any court of the United States, may be seriously endangered by longer confinement in jail, and that fact is made to appear clearly to any circuit judge, or to the judge of the county court of the county, such judge, must, by an order in writing, direct the sheriff or jailer to remove him to some suitable place, or hospital, as near as may be to the jail, and there safely keep him until his health is sufficiently restored to authorize his recommitment to jail.

"4812. **Same; guards summoned.**—When prisoners are removed from the jail under the provisions of either of the two preceding sections, the sheriff or jailer has authority, and it is his duty, to summon such guards as may be necessary to insure their safekeeping.

"4813. When jail unsafe, guards summoned to prevent escapes.

—When the county jail is insecure or insufficient, and there is reason to apprehend an escape, the sheriff has authority, and it is his duty, to summon as many guards as may be necessary to prevent an escape."

In an opinion reported in Quarterly Reports 2, at page 100, I had occasion to consider a similar question. At that time I stated that I did not find any authority of law that would authorize the payment of the guards summoned under the provisions of Section 4811. I am of the opinion that that statement was erroneous and the same is hereby withdrawn or expressly overruled. The requirement of the court order under Section 4811 is that the prisoner be placed in some suitable place or hospital and there safely kept. It is clear that under these sections the sheriff not only has the authority, but it is his duty to summon such guards as might be necessary to insure the safe keeping of the prisoner. These guards are not public officials, so that the rule of law that a person taking public office is presumed to accept the same with all the burdens thereof, even to acting without pay, does not apply and I find no legal authority for holding that such guards must serve without pay. Since the opinion in Quarterly Reports 2, page 100, above referred to, I have located a case of the Alabama Supreme Court decided in 1871, which seems to carry with it authority for the pay of such guards. This is the case of **Montgomery County v. Barber, Sheriff**, 45 Ala. 237. In that case the sheriff summoned certain guards on account of the unsafe condition of the jail, as authorized by the statute which now appears as Code Section 4813. The county paid these guards for several months and then stopped. The sheriff thereupon paid the guards out of his own pocket and filed a suit against the county to recover the amounts so paid by him to the guards. The Supreme Court sustained his right to recover. I am, therefore, of the opinion that under the authority of this case the county has the authority to legally pay the salary of these guards and that such right is necessarily implied from the provisions of Code Sections 4811, 4812, and 4813.

Your letter requests the further opinion as to your liability for paying a certificate, knowing that the recitals therein are untrue. In this connection, I call your attention to the rule laid down by the Supreme Court in **Mobile v. Williams**, 180 Ala. 639, 61 So. 916:

"When there are, either upon the face of the claim or upon the face of the records of the court of county commissioners or otherwise, evidences brought home to the county treasurer that a claim, although allowed by the court of county commissioners, is in fact invalid, then it is the duty of such treasurer to refuse to pay such claim and to present, on behalf of the county, the defense of such county to such claim. If he pays such a claim he does so at his peril."

See also Biennial Report 1928-30, 589 at 590.

However, since payment may be made for the services of guards in the above circumstances, there will be no occasion for the judge to issue certificate to the guard showing service as a bailiff and this question is now a moot one.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 25, 1938

Hon. Wm. F. Maynor,
County Superintendent of Education,
Blount County,
Oneonta, Alabama

Schools—Election for special district tax cannot be ordered to be held until special county-wide tax is being levied and collected.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of February 10, 1938, which is as follows:

"We are wanting to save all the money we can in holding our county-wide three mill tax and our district three mill tax elections. We are wondering if we can hold the county-wide April 26 at one of our elections and the local district tax election on the third of May following. Some of our lawyers do not see anything contrary to legality, however, one says that there must be at least 30 days between these elections, that the law may not be violated, because the first election for the constitutional three mill tax must be voted before the advertisement of the local district three mill tax begins.

"However, both taxes would receive 30 days publication, but there would be an over-lapsing of time of the two advertisements. Inasmuch as these are separate and distinct taxes, but the former must be voted before the last can be, under the law. Under this procedure will these taxes be legal or will we have to give the constitutional three mill 30 days notice and vote on it before we will be allowed to give 30 days notice on the local three mill district tax?"

I am of the opinion that your inquiry should be answered in the negative.

Section 262 of the School Code of 1927 provides as follows:

"Section 262. WHEN DISTRICT TAX CANNOT BE LEVIED.—No election in any rural or city school district shall be held for the purpose of levying and collecting a special school tax for school purposes unless the County in which said rural or city district is located shall be levying and collecting special County Taxes for school purposes of not less than thirty cents on each one hundred dollars worth of taxable property in such County."

In construing said section in connection with Constitution of 1901, Amendment III, our Supreme Court has held that the primary and essential condition upon which an election is authorized to be **ordered and held** is the fact that the county is already levying and collecting such a tax.—**Harmon v. County Board of Education**, 230 Ala. 260, 160 So. 687. In other words, the Court of County Commissioners is without authority to order a special district tax election, where petition for election does not allege that county was levying and collecting special county taxes for school purposes.—**Wall-Hay-Wall Lumber Co. v. Mathews**, 211 Ala. 426, 100 So. 824; **Gantt v. Court of County Commissioners of Covington County**, 210 Ala. 125, 97 So. 129. See also **Southern Ry. Co. vs. Webb**, 232 Ala. 324, 167 So. 729; **Opinion of Attorney General to County Superintendent of Education of Houston County** on May 21, 1935; **Opinion of Attorney General to Chairman, County Board of Revenue of Calhoun County** on March 28, 1935; **Biennial Report of Attorney General**, 1926-1928, p. 449.

From the foregoing, it appears that before an election for a special district tax can be ordered to be held that the county must be levying and collecting a special county tax. Therefore, the county governing body cannot order the election for a special district tax until this situation exists. In the instant case, the election for the special three mill district tax could not legally be ordered for May 3rd if the election for county tax was not held until April 26th. The election could not be ordered for the district tax until the county tax is being levied and collected. A thirty day notice is required of each election. It would be necessary to wait until after the election of April 26th before the other election could be ordered.

Since you desire to save money by holding the election for the district tax at a regular election, may I suggest that arrangement be effectuated to hold same on the date of the second primary in June which should give sufficient time if the vote is for the county tax on April 26th.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 25, 1938

Hon. D. E. Dunn, Administrator,
Alabama Alcoholic Beverage Control Board
Montgomery, Alabama.

Alabama Beverage Control Board—does not have authority to promulgate rules and regulations designating locations of billboards used to advertise malt or vinous beverages, however, said bill boards must be otherwise lawfully located.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of November 16, 1937, which is as follows:

"Section 10 of the Beverage Control Act in part sets forth:

'..... provided, however, that malt or vinous beverages as herein provided may be advertised by means of bill boards.'

"You have rendered an opinion defining billboards. The Board is desirous of ascertaining at this time an opinion from you as to whether or not they have the authority to promulgate rules and regulations designating the location of billboards.

"This opinion is requested due to the fact that it has been brought to the attention of this Board by various organizations and individuals that manufacturers are distributors of malt or brewed beverages are cluttering up the highways with bill boards advertising beer. Therefore, I would appreciate your rendering an opinion, stating in full just how much authority this Board has to promulgate rules and regulations in regard to the use of billboards for such advertising."

I am of the opinion that your inquiry should be answered in the negative, however, said billboards must be otherwise lawfully located.

Article 5 of Chapter 167, Code of 1923, dealing with the advertising of alcoholic beverages, was specifically repealed in Section 5(9) of the Ala-

bama Beverage Control Act. The advertising is regulated by Section 10 of Said Act, which provides as follows:

"Section 10. In order to protect the welfare, health, peace, temperance and safety of the people of the State, and to prevent the return of the saloon atmosphere, there shall be no alcoholic beverages as defined herein sold in less than sealed packages and/or consumed by purchasers, except as hereinafter provided. There shall be no open saloons operated within this State. There shall be no advertising of alcoholic beverages as enumerated and defined herein, except through newspapers, magazines, and radio broadcasting stations **provided, however, that malt or vinous beverages as herein provided may be advertised by means of billboards.**" (*Italics supplied*)

It will be seen from Section 10, *supra*, that there is a specific authorization allowing advertising of malt or vinous beverages by means of billboards.

Section 7 of the Act provides as follows:

"Section 7. (a) The Board may from time to time make such regulations not inconsistent with this Act, as it shall deem necessary for carrying out the provisions of this Act, and from time to time alter, repeal or amend such regulations, or any of them.

"(b) Prima facie evidence of any such regulation may be given in all courts and proceedings by the production of what purports to be an official printed copy of such regulation, alteration, repeal or amendment."

The Board is authorized to make reasonable rules and regulations **not inconsistent with the provisions of the Act.** As the Act specifically authorized advertising of malt and brewed beverages by means of billboards, a rule or regulation governing the designation of the locations of said billboards would, in my opinion, be inconsistent with the provisions of the Act and unwarranted. In other words, the Board, by a rule or regulation, could deprive one of the prerogative granted by the expressed terms of the Act. Section 7, *supra*, in my judgment, is applicable only to instances not covered by the expressed terms of the Act. If a certain matter is covered, the Board is unauthorized to promulgate a rule or regulation contrary there to.

The above is, of course, limited to billboard advertising of malt and vinous beverages that is otherwise lawful. If the scenic beauty of a highway is affected by the billboards, then the matter comes under the jurisdiction of the Highway Department in accordance with the provisions of the Highway Act of 1927. (See General Acts 1927, p. 348, Section 44 and 101).

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 25, 1938

Hon. R. E. Adams,
Judge of Probate,
Escambia County,
Brewton, Alabama.

License—Typewriter—

Under facts stated party liable for license prescribed by Schedule 4 of General Revenue Act, 1935.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of January 11, 1938, in which you inquire as follows:

“Remington Rand, Inc., manufactures and distributors of typewriters, adding machines, etc. maintain a factory branch office in Mobile.

“This company consigns their machines to an agent in this county and he displays them, offers for sale and sells them.

“The license inspector has cited this local agent to pay the state and county license required of typewriter dealers. The person whom he cited is of the opinion that he is not due this license by reason of the fact that such machines are consigned to him, and he acts only as sales agent.

“Your official opinion is requested, touching on the liability of this sales agent for the payment of a typewriter license.”

As I understand the facts set forth in your letter, the party inquired about maintains a place of business in Escambia County, at which place of business he displays for sale and sells typewriters, adding machines, etc. as agent for Remington Rand, Inc., which company maintains a factory branch office in Mobile.

Schedule 4 of the General Revenue Law of 1935 (Simon's Revenue Compilation, p. 218) is as follows:

“Each person engaged in the business of selling * * * TYPEWRITERS, or similar machines, shall pay the following annual privilege tax:” (Here follows schedule of taxes based on population).

It is apparent from your inquiry that the party mentioned is “engaged in the business of selling” the articles mentioned or some of them, in Schedule 4. You are therefore advised that the party so engaged is liable for the payment of the typewriter license imposed by Schedule 4, supra.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 25, 1938

Hon. J. Hilton Blount,
Tax Collector,
Washington County,
Chatom, Alabama.

Taxation—Interest on delinquent taxes.

Rate of interest on delinquent 1934 taxes is 8% from delinquent date until effective date of Section 166 of the Revenue Act of 1935, which provided 6% interest on such taxes.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"The Ala. Tenn. and Northern railroad went into receivership in 1934 and did not pay the tax due Washington County for that year.

"On December 10, 1937, Mr. John T. Cochrane, Trustee, sent voucher for the tax plus interest at 8% from January 1, 1935 to Dec. 10, 1937.

"I receipted him for the amount, and made my reports and paid the money to the State, County, and School Treasurers.

Now Mr. Cochrane asks that I return to him \$134.77, claiming that he should only have paid 8% to July 11, 1935, and 6% from July 11, 1935 to present date of payment (Dec. 10, 1937).

"I have a letter from State Comptroller advising me that the 6% rate does not apply to unpaid 1934 tax even if tax is paid after October 1, 1935.

"The question I would like to have answered immediately; What rate of interest should the Ala. Tenn. and Northern R. R. pay on 1934 tax? Should it be 8% for all the time, or when does rate change to 6%?"

In my opinion the rate of interest accruing on 1934 taxes is 8% from delinquent date to and including the effective date of the General Revenue Act of 1935. By Section 166 thereof it is provided:

"All taxes becoming delinquent, bear interest at the rate of six per cent per annum; and such interest must be added to and collected as part of the taxes, and reported in such manner as the State Comptroller may prescribe."

And by Section 407 thereof it is provided:

"Except as otherwise provided in this Act, all the provisions of this Act shall go into effect on the first day of October, 1935."

On and after October 1, 1935 the rate of interest on delinquent taxes is 6%, and not the rate of 8% theretofore provided by law. Quarterly Report of the Attorney General, Vol. I, page 261.

Section 412 of the Revenue Act of 1935 provides:

"Nothing in this Act shall be construed to relieve any person from any tax liability, penalty or forfeiture incurred under laws existing before the effective dates of the provisions of this Act, and any provisions of any laws existing before the effective dates of the provisions

of this Act, providing for the collection, and enforcement of such tax liability, penalty or forfeiture shall, as to such tax liability, penalty or forfeiture, remain in full force and effect."

However, in my opinion, this provision does not effect the change in interest rates from 8% to 6% provided by Section 166 thereof, supra.

Subdivision (3) of an opinion addressed to Judge Tompkins, appearing on page 44, Volume VI, Quarterly Reports of Attorney General, holds that ad valorem taxes accruing subsequent to a tax sale held after February 9, 1935, bear interest at 6 percent from February 9, 1935. That opinion is hereby modified to hold that the rate of interest on delinquent ad valorem taxes changes from 8% to 6% on October 1, 1935, and not on February 9, 1935.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 25, 1938

Hon. Gaston Scott, President,
Highway Commission,
Capitol.

Highway Department—May substitute performance of contract bonds.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I am in receipt of your letter wherein you ask the following:

"On October 29, 1937, the Couch Construction Company entered into contract with the State Highway Department for the construction of FAP 422-B and 199 reopened, on the Opelika-Phenix City Road, and the Tuskegee-Phenix City Road, in Lee and Russell Counties. The amount of this contract was Two Hundred Eight Thousand Nine Hundred Ninety-Nine Dollars and Nineteen Cents (\$208,999.19). The Couch Construction Company furnished this Department with our standard bonds signed by the United States Fidelity and Guaranty Company. On the same date the State Highway Commission approved this contract with Couch Construction Company and the bonds attached thereto and made part of the said contract, and on the same date the Governor of the State approved the contract and bonds.

"On November 3, 1937, our Mr. B. L. Bray, who handles contracts in this office, submitted to the Highway Commission a letter which was dated October 29, 1937, from the Couch Construction Company together with bonds on our standard form written by Standard Accident and Insurance Company covering the above named project, and requested that these bonds be substituted in lieu of the bonds already written by the United States Fidelity and Guaranty Company, approved by the State Highway Commission and the Governor.

"Please advise, if in your opinion, the State Highway Commission would have authority to substitute these bonds as per the request of the Couch Construction Company should they see fit to do so."

Under the facts as presented in your inquiry, I can see no objection to the substitution of the bonds provided the work on the project had not already started, or, if begun, that the new bonds are so worded as to encompass complete coverage to the State and further that the contract of which the substituted bond is a part be re-approved by the Governor. By Act of the Legislature of 1935, at page 70, Section 1, it is provided: A contractor, "shall be required before commencing such work to execute a performance bond, * * *" (Italics ours.) It would appear from a mere reading of this portion of the section that this would be sufficient. However, in the case of *Citizens Bank vs. Pearson*, 217 Ala. 391 at page 393, the court said:

"* * * that the contract included the plans and specifications and the latter, for appropriate reference, included the bond that was given by Appellee for the due prosecution and execution of the contract. This was but one transaction; and said undertakings, when duly executed, are considered together, or are necessarily and materially related to the other."

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 15, 1938

Dr. Thos. D. Hopkins,
Associate Member,
State Board of Optometry,
Montgomery, Alabama

Optometry—Qualifications for examination of applicants—

1. Applicants for examination to practice optometry in Alabama held to be entitled to second examination without payment of fee, provided such examination was taken in not less than six and not more than twelve months subsequent to the last examination taken by applicant.

2. Applicants required to have qualifications of graduation from high school and three years' course of study in approved school optometry, as well as ability to pass examination on provided by the State Board of Optometry.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your request under date of February 4, 1938, requesting my opinion as follows:

"Prior to its amendment in September 1935, Section 2880 of Article 2, Chapter 52, contained a provision for the acceptance, by the Examining Board, of applicants, both college graduates and those who had studied under an Optometrist for three years. The Law now prescribes that the applicant must have completed a three-year college course in Optometry.

"Some of the understudies or apprentice-type took the Examinations in June 1935 and failed. Some requested a second trial, which was granted in June 1936, and again failed. The Law provided for a second exam-

ination without further cost if applied for prior to one year from date of the first examination. They did not apply in 1937.

"This Board has ruled that the men coming under the aforesaid classification have no further rights to file an application for re-examination, without first qualifying under the new Law. But, some have insisted that they do have another chance.

"It is, therefore, kindly requested that you give a formal opinion on the status of these men as early as possible."

In reply, I wish to call your attention to Section 2882 of the Code of 1923, which provides as follows:

"2882. Second examination.—If any applicant fails to pass the standard examination he shall, after six months and prior to twelve months from the date of said failure, be permitted to take a second examination without the payment of any additional fee. Should he fail to pass the second examination the fee of twenty-five dollars which accompanied his original application shall be forfeited to the board, and he shall not be entitled to another examination without making a new application and paying a fee of twenty-five dollars."

I wish to further call your attention to the Acts of 1935, page 897, Section 3, which amends Section 2880 of the Code of 1923 to read as follows:

"Section 3. That Section 2880 of the Code of Alabama 1923 be amended so as to read as follows: 2880.—EXAMINATION BEFORE BOARD.—Every person desiring to commence the practice of optometry, except as otherwise provided, shall take the standard examination provided in this article and fulfill the other requirements as herein provided. Such applicant must be twenty-one years of age, or over, a citizen of the United States and of good moral character, must be a graduate of an accredited High School and must have completed the course of study in an approved school, college or University of Optometry, which requires at least three years course of study and must be able to pass the standard examination prescribed by the State Board of Optometry. Each applicant must take proper application and pay to the Secretary-Treasurer of the State Board of Optometry, the sum of Twenty-Five Dollars (\$25.00). Such standard examination shall consist of tests in practical, theoretical and physiological optics, in theoretical and practical optometry and in the anatomy and physiology of the eye and in pathology as applied to optometry. Such standard examination shall not be out of keeping with the established teachings and adopted text books of recognized schools of optometry."

In my opinion, the qualifications for the practice of optometry in Alabama include the requirements of graduation from an accredited high school and the completion of the course of study in an approved school, college or University of optometry, which requires at least three years course of study as well as the ability to pass the standard examination prescribed by the State Board of Optometry. You will note that these provisions are specifically set out in Section 2880 of the Code of 1923, as amended by the Acts of 1935 page 897, quoted supra. You will further note that Section 2882 of the Code of 1923, set out supra, provides for a second examination, provided that said second examination is taken after six months and prior to twelve months from the date of the failure of the applicant on his first examination, you will note that should the applicant fail to pass the second examination, that the fee of \$25.00 which is provided for by law, is forfeited

to the State Board and that by the provisions of Section 2882 of the Code of 1923, supra, the applicant is not entitled to another examination until a new application is made and a fee of \$25.00 is again paid.

Premises considered, it is my opinion that applicants who failed to pass the examination given in June, 1935, who were granted a second trial in June, 1936, at which time the applicant again failed, must now pay an additional \$25.00 in order to take any further examination.

It is further my opinion that under the provisions of the above-quoted law these applicants must have qualifications set out under the Acts of 1935, page 897, Section 3; namely, graduation from an accredited high school and the completion of the course of study in an approved school, college or University of Optometry which requires at least three years course of study.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 8, 1938

Dr. J. O. Foster,
County Health Officer,
Crenshaw County,
Luverne, Alabama.

County Board of Health is without authority to assess and collect fees for granting permits and issuing certificates to midwives.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of February 25, 1938, in which you request my opinion as follows:

"Will you please give me an opinion as to whether or not a County Medical Board has authority to assess and collect a fee for granting permits to midwives. May I have your opinion as soon as possible?"

In answering your request I call your attention to Section 1064 of the Code of Alabama, 1928 (Mitchie's), here provision is made for the registration of midwives and the issuance of certificates by the County Board of Health, but there is no provision made for charging fees for such certificate. Therefore we must look to the general provisions regulating fees and costs. In this connection I call your attention to Section 3665, Code of 1886, which is as follows:

"3665. No fee charged unless expressly authorized. The law of fees and costs must be held to be penal, and no fee must be demanded or received except in cases expressly authorized by law."

This Section has been brought forward in all of the codes and is now found in the Code of 1923 as Section 7255. Therefore, it is my opinion that the County Board of Health would be without authority to charge a fee for issuing such certificate to midwives. See **Troup v. Morgan County**, 109 Ala. 162.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 8, 1938

Hon. Henry S. Long, Chairman,
State Tax Commission,
Capitol.

Income Tax—Agricultural Cooperative Associations exempt from
the payment of income tax.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I wish to acknowledge receipt of your letter in which you stated:

"It is requested that you examine Articles of Incorporation of the Bankhead Cooperative Association, a copy of which is attached, and furnish this office an opinion as to whether or not the Corporation is exempt from income tax returns and payments under Section 345.25 of the Alabama Income Tax Law, approved July 10, 1935.

"Since it is necessary that we advise this Association, as well as others organized for the same purpose, in regard to their income tax liability prior to March 15, 1938, the final date on which returns are due, it will be appreciated if you will give this matter your usual prompt attention and favor us with an opinion within ten days, if possible."

It is my opinion that this association or corporation is exempt from the payment of income tax. Section 345.25 of the Income Tax Act (Laws of 1935, p. 415) effective July 10, 1935, provides in subsection 7 thereof that:

"Farmers' fruit growers' or like associations organized and operated as sales agents for the purpose of marketing the products of members and turning back the proceeds of sales, less the necessary selling expenses, on the basis of quantity of produce furnished by them,"

shall be exempt from taxation under this Article. The instant corporation was established on a government agricultural project and operating with funds loaned by the government and was formed to carry on consumer, service, production, processing and marketing enterprises on a cooperative basis. No dividends are to be paid on ownership but after the usual reserves are provided, including the retirement of the debt to the Farm Security Administration, patronage dividends are to be distributed.

It is my opinion therefore that the Bankhead Cooperative Association comes directly under the definition referred to in Section 345.25, supra.

On July 17, 1935 which you will note is subsequent to the Income Tax Act (Laws of 1935 Act p. 397) the Legislature at page 604, the General Acts of 1935, provided for the incorporation, organization and regulation of mutual, cooperative marketing and purchasing associations of agricultural products. The Articles of incorporation which are annexed to your letter follow the terms of this act completely as to all material points. By Section 15, General Laws of Alabama, 1935, at p. 610, certain exemptions from taxes are allowed except as to an ad valorem tax on land and personal property owned by the association or corporation and further this section reads in part:

"Nor shall such corporation be liable for any other license or privilege fee or tax for the purpose of engaging in or transacting business, or otherwise, in this State."

By reading Section 345.25, supra, together with Section 15 of the Act above referred to, it is my opinion that the legislature intended to exempt an association such as the Bankhead Cooperative Association from the payment of an income tax.

I wish to call your attention to the fact that the law is silent as to whether or not such an association is exempt from filing a return.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 8, 1938

Hon. Matt A. Boykin,
Judge of Probate,
Mobile County,
Mobile, Alabama.

Taxation—Redemption of land sold for taxes—Person who has made application to redeem on the installment plan various parcels of land which were sold in his name for the non-payment of 1932 taxes and bid in by the state at the tax sale, in accordance with Section 291 of the 1935 Revenue Act, as amended, and has paid one-fourth of the taxes due, may subsequently pay the taxes in full on certain parcels included therein, and continue his installment payments on the remainder of said parcels.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of February 10, 1938, which follows:

"On December 30, 1936, Mr. J. H. Webb of this city made application to redeem on the installment plan various parcels of land which were sold in his name for 1932 taxes. Mr. Webb paid one fourth of the taxes due, plus the costs in the sale, in accordance with Section 291, H. B. 324; his application was approved by the State Tax Commission on February 16, 1937, and the redemption was entered on our books on February 18, 1937.

"Included in this redemption were a number of lots in Sunset place, a subdivision of the City of Mobile. Mr. Webb has now requested us to allow him to cut out four of these lots from his installment redemption and pay the taxes on them in full, a transaction which he has recently effected making it imperative that he clear their title.

"We should appreciate your advising us, therefore, if such a redemption comes within the scope of the redemption laws, and if we should allow it."

Hon. N. B. Tompkins, Judge of Probate, Colbert County, Tuscumbia, Alabama, made inquiry of us as follows:

"It seems that the new revenue act approved July 10, 1935, provides that the owner of real estate sold for taxes may redeem any part of such real estate included in the assessment without redeeming all the property assessed. Please advise whether I am correct in this assumption and

also whether this partial redemption provision applies to sales made prior to this act."

We answered his inquiry as follows in an opinion addressed to him under date of October 17, 1935, Quarterly Report of Attorney General, Vol. I, page 88:

"In reply to question 1, I advise that Section 271 of the Revenue Act of 1935 provides as follows:

"Section 271. When distinct lots or parcels of land have been included in one assessment and sold for taxes under one decree, any person including the owner, whose interest in one or more of such lots or parcels is such as to entitle him to redeem, may redeem the lots or parcels in which he has such interest, without redeeming all of said property, provided that any owners desiring to redeem any one or more parcels of land must also pay all tax on personal property assessed against him in said assessment, together with all cost of court and advertising fees."

"This language is so explicit that it is a clear authorization for partial redemptions. There being no limitation on the time, I assume that it applies to any property sold to the State and which is still in the possession of the State."

We also held to the same effect in an opinion to Hon. Eugene H. Hawkins, Judge of Probate, Jefferson County, Birmingham, Alabama, under date of November 22, 1935, Quarterly Report of Attorney General, Vol. I, page 207. Judge Hawkins asked us to advise him whether or not there may be a partial redemption by the owner from tax sale on the installment basis. In our opinion to him, *supra*, we advised as follows:

"I find nothing in the terms of Section 291 indicating that this application is limited to cases where all the property is redeemed and, in the absence of such language, it is my opinion that the provisions of Section 291 apply to partial redemptions. Of course, the requirements of Section 271, 271-1 must be complied with as in other cases."

As to the general question of whether or not a person may, in availing himself of the privilege of redeeming on the installment plan, pay in multiples of one fourth of the amount due on the property he seeks to redeem, we held as follows in the above cited opinion to Judge Hawkins:

"Does this permission to pay without interest apply to parties who desire to redeem in cash and not avail themselves of the four years partial payment plan? The unreason of charging a person interest who pays cash and not requiring interest of a person who takes four years to pay argues more strongly that it does. On the other hand, it has been pointed out that the statute provides that the party redeeming shall deposit one-fourth of the amount required and 'annually thereafter shall pay, etc'. This has been argued to be a mandatory requirement that such payment shall be annual and that in order to be exempted from the payment of interest the partial payment plan with payments on an annual basis must be strictly followed.

"I am not convinced that so strict a limitation can be placed on the language. In the first place, the language is 'may pay'. This is clearly permissive. The parties 'shall have four years'. This is an outside limitation, I think, not a specific command that such parties must take four years whether they so desire or not. The words 'annually thereafter' do not convey to my mind an absolute requirement that the payments must be annual and can be made in no other way. Coupled with Section 292, it appears to me that unless a party makes the quarterly payments

at least annually, he will be in default. I do not think the Legislature intended to say to a redemptioner: 'If once you elect to follow the partial payment plan, you cannot pay up all the installments and release the property entirely except by making a payment of twenty-five per cent (25%) annually' Such a conclusion is opposed to sound logic as well as the purpose sought.

"It is, therefore, my conclusion that as to property sold to the State for taxes prior to January 1, 1935, if application is made within four years from the date of sale, redemption is authorized by Section 291 without the payment of interest and this is true whether such redemption be for cash or on the partial payment plan. I think further that should a person paying the first installment desire to complete his future payments in less time than allowed, he has that right, though such payment must be in multiples of one-fourth of the total amount originally due."

This position was reaffirmed after the passage of Act No. 81, General Acts 1936-1937, page 91, approved February 3, 1937, which is an act to further provide for the redemption of real estate heretofore sold for taxes and, prior to January 1, 1935, bid in by the State at tax sale, in an opinion to Hon. W. E. Butler, Judge of Probate, Madison County, Huntsville, Alabama, under date of June 26, 1937, Quarterly Report of Attorney General, Vol. VII, page 262. In this opinion we spoke as follows:

"Question 4 of your letter presents a matter upon which an opinion of this office has already been rendered. Quarterly Report, Attorney General, Vol. I, page 207. This opinion refers to the provisions of Section 291, Revenue Acts of Alabama, 1935, and amended by Act 49, General Acts 1936, page 27. There is such a striking similarity and identity between the provisions of Section 291, supra, and H. B. No. 259, supra, as to the time and manner in which the installments may be paid, that I feel no hesitancy in adopting as a part of this opinion a portion of the opinion as follows: (Then follows the same excerpt from the opinion to Judge Hawkins, which is quoted hereinabove.)

"I, therefore, conclude that the Act of February 3, 1937, authorizes redemption payments of any amount in multiples of one-fourth of the redemption charges originally due. Such anticipation may be made without the payment of any interest or penalties that are waived when redemption is effected through one-fourth annual installments."

Considering all of these opinions, and the provisions of law therein cited and construed, together, it is my opinion that a person who, after making application to redeem on the installment plan several parcels of land which were sold in his name for non-payment of 1932 taxes and were bid in by the state at the tax sale, which said application was duly approved by the property authorities, has paid the first installment due thereon, may pay the total taxes due on certain parcels included therein, and continue his installment payments on the remainder of the parcels. Of course, when he does so, he must comply with all of the provisions of Section 271 of the 1935 Revenue Act, which includes the payment of all taxes on personal property assessed against him in said assessment, together with all cost of court and advertising fees.

Of course, if the party described in your letter is delinquent in one of his installments, or in the payment of taxes which have accrued since the redemption was effected (and there is nothing before me to indicate whether or not he has paid his second installment, which has already become due, or the taxes which have accrued since the redemption was effected), then the question of whether or not he could pay all taxes due on certain parcels

included therein and continue his installment payments on the remainder of said parcels would be a matter that addressed itself to the discretion of the State Land Commissioner, in accordance with the provisions of Section 292 of the 1935 Revenue Act, which reads in pertinent part as follows:

"The State of Alabama shall have a lien on all unpaid partial payments as well as for taxes for any subsequent year, and in case of the failure to pay any one of said installments together with the taxes for the subsequent year, either or both, the State Land Commissioner for and in the name of the State of Alabama, shall at his option declare all said installments due and payable at once."

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 8, 1938

Hon. E. C. Whelan,
License Inspector,
Jefferson County,
Birmingham, Alabama.

License Tax—Foreign Corporation doing business in Alabama erecting bill posts or advertisements not engaged in Interstate Commerce—subject to pay a license tax in each county.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I am in receipt of your letter of recent date wherein you request the following:

"I would appreciate very much if you will give me your opinion as to whether or not the National Outdoor Advertising Corporation of Atlanta, Georgia is liable for Bill Posting or Advertising license under Schedule 23 of the 1935 General Revenue Acts under the following facts: (1) The National Outdoor Advertising Corporation, a foreign corporation, has not qualified to do business as a foreign corporation in this State. (2) They solicited outdoor advertising business in Jefferson County, and on October 16, 1936 entered into a contract with the Banner Baking Company, Inc. of Birmingham to sell and erect 50 Octagonal Display signs upon the highways of Jefferson County. They also sold to or entered into a contract with the R. L. Zeigler Sausage Company of Bessemer, Ala., some 50 or more signs, (3) These signs are manufactured in Atlanta, Georgia and are brought to Jefferson County by an agent or employe of the National Outdoor Advertising Company on their motor vehicle and erected by the employe of the National Outdoor Advertising Corporation. (4) According to the information of this employe, if a sign is destroyed or in need of repair, he replaces the sign with a new sign or repaints and repairs on periodical trips, going over the highways of Jefferson County when such signs are in need of repair and that is a part of the service that National Outdoor Advertising Corporation renders to the people from whom they get contracts to do their advertising business.

"I am enclosing a copy of their contract with the Banner Baking Company, Inc. as the president of The National Outdoor Advertising

Corporation protests the payment of any license because he claims he is doing an interstate commerce business.

"If in your opinion the National Outdoor Advertising Corporation is liable for the license under facts stated, would they have to pay the amount due the State and the amount due the county in each county in which they do business within the State of Alabama, or could they pay a license in a county of less than 30,000 population and then be relieved of paying any further state license in other counties where they do business?"

I will answer your problem by dividing it into two parts, first, as to whether the transaction involved is Interstate Commerce and second, what license if any must be paid.

1. It is my opinion that the National Outdoor Advertising Corporation, under the facts stated, is not engaged in Interstate Commerce and is liable for a license tax under Schedule 23 of Section 348, Revenue Laws of 1935. The erection of billboards in and of themselves is Intrastate Commerce. **Packer vs. Utah**, 285 U. S. 105; **Eberling vs. Foster**, 12 Fed. Supp. 489; **North American Service Co. vs. Vick**, 243 S. W. 549. The only point we have to consider here is the fact that these signs in question were manufactured in Atlanta, Georgia, brought to Birmingham by the National Outdoor Advertising Corporation and erected by the employees of the firm, the National Outdoor Advertising Corporation. The courts have held that where an article shipped in interstate commerce comes to rest at its destination in another state it no longer is an article of interstate commerce. (*U. S. vs. Riggen*, 29 Fed. (2) 1016). But there is an exception to this rule, that is, where the transaction involves only a sale and a delivery from one state to another there is no doubt that the transaction would be in interstate commerce, and where the transaction involves the transporting and constructing and where the construction or erecting requires special skill so as to make the construction and erection an integral part of the sale, it remains interstate commerce. **Browning vs. Waycross**, 233 U. S. 16; **General Railway Signal Co. vs. Virginia**, 246 U. S. 500. In this particular case no special skill or knowledge is required to erect the signs called for by this contract. Any local labor skilled or unskilled could be employed to do the work of the employees of the National Outdoor Advertising Company, so that this transaction does not come within the exception as outlined above.

In this particular case the general test to be applied is whether the dominant characteristic of the transaction is interstate overshadowing the intrastate features. (*Bay City vs. Frazier*, 77 Fed. (2) 570). The important part of this contract between the National Outdoor Advertising Company and the Banner Baking Company, Inc. is not the manufacturing of the signs but the erection and placing of those signs in advantageous places along the highways of Jefferson County. And the mere erection of a sign is a local act having nothing to do with interstate commerce. **Beard vs. U. & A. Publishing Co.** 71 Ala. 60; **American Amusement Co. vs. East Lakes Chutes Co.** 174 Ala. 526; **Smythe Company vs. Ft. Worth Glass Company**, 142 S. W. 1157.

Therefore in my opinion the dominant characteristic of this transaction is intrastate and under the test outlined above, this transaction is not one involving interstate commerce. The license tax to be levied herein involves merely the doing of a local act after interstate commerce had completely terminated, i. e., the erection of bill posters. The Statute involved, Section 348, Revenue Laws of 1935, reads:

"348. Every person, firm, company, corporation or association, receiver or trustee, but not a governmental subdivision, engaged in any

business, vocation, occupation, calling or profession herein enumerated, or who shall exercise any privilege hereinafter described for which a license or privilege tax is required, shall first procure a State license, and a County license when so required, and shall pay for the same, or shall pay for the exercise of such privilege the amounts hereinafter provided and comply with all provisions of this Act."

Schedule 23 of said section reads in part:

"All bill posting and advertising companies displaying advertisement in public places, including street cars and each person engaged in the business of advertising or bill posting * * *."

The words "engaged in the business of" have been defined by the Supreme Court of Alabama (**Beard vs. U. & A. Publishing Company**, *supra*) to be, "there must be a doing of some of the work, or an exercise of some of the functions for which the corporation was created, to bring the case within that clause." Here the corporation is engaged in the business of erecting bill posters and advertisements for which the company was organized.

The contract involved herein not only calls for the erection of certain signs but further the corporation undertakes to "service" the signs and this involves a continuation of "doing business" in this State which again would take this transaction out of the purview of interstate commerce. **Bay City vs. Frazier**, *supra*. I refer you to the following cases where a transaction such as the one involved herein has been held not to be interstate commerce.

Packer Corporation vs. Utah, *supra*.

Jello Company, Inc. vs. Landes, 20 Fed. (2) 120

Motor Supply Company vs. General Outdoor Advertising Company, 44 S. W. (2) 507.

The tax herein sought to be imposed upon the corporation is not one upon the manufacturer of the signs but is really upon the intrastate function, i. e., the privilege of engaging in the business of erecting advertisements which this State has a perfect right to tax.

2. It is my opinion further that the corporation would have to pay the tax provided by Schedule 23 of Section 348, Revenue Laws of 1935, in every county in this State wherein it engages in the business of erecting and "servicing" bill posters or advertisements. Since it does not have any named place of business within this State, the company comes under the provisions of Section 350 of the Revenue Laws of 1935, which reads in part:

"Section 350. Before any person, firm or corporation shall engage in or carry on any business or do any act for which a license by law is required, he, they or it, except as otherwise provided, shall pay to the Judge of Probate of the County in which it is proposed to engage in or carry on such business or do such act, the amount required for such license, and shall comply with all the other requirements of this Act; and upon the payment of such amount and a fee of fifty cents to the Probate Judge for the issuance of such license, and all costs and fees and penalties which shall have accrued, or for which such person, firm or corporation shall have become liable in any proceedings commenced for the collection of such license, or to enforce payment thereof, and upon compliance with all other provisions of this Act by the applicant, such judge shall issue the license countersigned by him in the form and on the blank to be furnished to him by the State Comptroller, which shall set forth and specify the name of the person, firm or corporation

applying therefor, the business or act which it is proposed to carry on or do thereunder, the name of the street or location where it is proposed to carry on the same if such location shall be a city or town and have a street number, and if not, then the location and amount paid for such license, and the time for which it is issued; and if the license is for a peddler it shall state whether he proposes to travel on foot or on horseback or on wagon or motor vehicle; and such license shall not be transferable except as otherwise provided herein, nor shall it entitle the holder thereof to carry on any other business or do any other act than that named therein. In case it should become necessary to remove any business for which a license is required by this section, from one location to another location in the same county, and such business be continued as the same kind and character and by the same person or firm as that carried on at the former location, another license shall not be required for such business for the same license year. (a) **Whenever a license is levied in this Act, there shall be collected both a State and County license for each place of business, except as specifically otherwise provided.**" (Italics ours).

Not having an established place of business in this State on which a state and county license tax can be levied, the National Outdoor Advertising Corporation would therefore be considered as engaging in the business of bill posting and advertising wherever it erects signs and each county involved therefor should collect a license tax as set forth in Schedule 23 of Section 348, Revenue Laws of 1935.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 9, 1938

Hon. O. L. Andrews, Clerk,
Circuit Court, Tenth Judicial Circuit,
Birmingham, Alabama.

Jefferson County—Judgments of Court of Common Claims have same effect as those of the Circuit Courts.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I am in receipt of your letter wherein you ask the following:

"The Jefferson County Court of Common Claims was established in July 1931, General Acts 1931, page 621. This Act was repealed and all cases and records transferred to the Circuit Court in 1935, General Acts, 1935, page 123.

"There has been some difference of opinion as to the life or duration of a judgment rendered in the Court of Common Claims before it was abolished and I would respectfully request your opinion on the following questions:

"(1) Is a judgment rendered in the Jefferson County Court of Common Claims, before it was abolished, governed by the rules of a Justice of the Peace or Inferior Court or by the rules of the Circuit Court as to its life or duration?

"(2) What would be the life or duration of a judgment rendered in the Court of Common Claims, before it was abolished?

"(3) When would a judgment rendered in the Court of Common Claims, before it was abolished, have to be revived by Scire Facias?

"(4) How many years must elapse after the date of a judgment rendered in the Court of Common Claims, before it was abolished, after which it cannot be revived by Scire Facias?

"(5) How many years must elapse after the date of a judgment which was rendered in the Court of Common Claims, before it was abolished, when a garnishment cannot be issued on said judgment?

"(6) After how many years from the date of a judgment rendered in the Court of Common Claims, before it was abolished, must suit be brought for collection of same?"

From a study of the General Acts of 1931 and the Act of 1935 by which the previous act was repealed, it is my opinion that the legislature intended to establish this court, the Jefferson County Court, of Common Claims, as a court with powers co-extensive with the Circuit Court but with some exceptions; such as is that contained in Sections 5 and 24 of the Act of 1931. With reference to judgments generally, Section 29 of the Act of 1931, p. 626, provides in part:

"The Judgments of these Courts may be recorded as provided by law for the recording of Judgments of the Circuit Court of this state. **and the provisions of the Code and said laws shall be applicable to all such Judgments,** and the said Judgments when so recorded, shall have the same force and effect as recorded Judgments of the Circuit Courts, and executions may issue on said Judgments in the said Circuit Courts. All Judgments of such Courts may be revived in the same manner as Judgments of the Circuit Courts of this State may be revived."

Therefore a judgment rendered in the Jefferson County Court of Common Claims before it was abolished was governed by the rules of the Circuit Court as to its life and duration. The Section of the Act of 1931 above referred to applies the provisions of the Code and the laws applicable to judgments of the Circuit Court to any judgment rendered by the Jefferson County Court of Common Claims. So that it is my opinion that prior to the Act of 1935, such judgments were governed by the rules of the Circuit Court and for the further reason that nowhere in the Act of 1931 is there any reference to the rules of the Justice of the Peace Courts or any other inferior court.

Therefore, I respectfully refer you to Article VIII, Sections 7862 et seq., Code of Alabama, 1923, and Section 8942, Code of Alabama, 1928 (Michie).

My answer to your first question dispenses with any further discussion of the problems you enumerate as they are governed by the Sections of the Code above referred to.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 9, 1938

Mrs. Frank C. Turner,
Judge of Probate,
Washington County,
Chatom, Alabama.

1. Bank designated by county governing body of a county as the depository for the official funds of the various county officials of said county, including the county treasurer in lieu of a county depository, must fulfill such requirements in regard to the safety of the funds so deposited by said officials as the county governing body shall make.

2. The amount and kind of security which a bank shall give in such a case is a matter that addresses itself to the county governing body. Act No. 60, General Acts 1933, page 51, approved March 10, 1933.

Opinion by the Attorney General.

Dear Madam:

Receipt of your letter of January 10, 1938, a letter from Hon. James N. Granade, President, Chatom State Bank, of same date and a letter from Hon. Wm. G. Lindsey, County Solicitor, Washington County, of January 11, 1938, and copies of an agreement entered into between the Chatom State Bank and Mrs. Willie Long Mills, as custodian of county funds of your county, and a resolution of your county governing body dated December 14, 1936, designating the Chatom State Bank as the depository for all county funds coming into the hands of the custodian of county funds for the calendar year 1937, is acknowledged.

From these various letters and the copy of the agreement and the resolution of your county governing body, I deduce the following facts: For the calendar year 1937 the county governing body of your county was unable to designate any bank in your county to act as county depository in lieu of a county treasurer, and the county governing body, by proper resolution, designated Mrs. Willie Long Mills to act as treasurer of your county for that calendar year, though she is designated as the custodian of county funds. Then, the county governing body, by appropriate resolution, designated the Chatom State Bank as the depository for the funds coming into the hands of the various county officials, including the said county treasurer or custodian of county funds, and required the Chatom State Bank to pledge as security for the funds to be deposited with it by the county treasurer certain Washington County, Alabama, Refunding Warrants which the Chatom State Bank did pledge, placing these warrants with another bank to be held in escrow by the bank with which they were placed, to be handled by it in accordance with the terms of the escrow agreement. The county governing body required no security from the Chatom State Bank for the funds to be deposited with it by the other county officials. The deposits in the Chatom State Bank are insured by the Federal Deposit Insurance Corporation.

You request my opinion as to whether or not the county governing body has acted in accordance with its legal authority in the premises, and whether or not it has required security, in sufficient amount or kind, from the Chatom State Bank.

The office of County Treasurer has long since been abolished in all counties having a population of not more than 55,000 population. Article II, Chapter 17, Code of Alabama 1923, Sections 312 et seq. Section 312, supra, was amended in 1932 by Act No. 218, General Acts 1932, page 227, approved November 8, 1932, to make the provisions thereof apply to all counties having a population of not more than 56,000. Therefore, in all counties having a

population of less than 56,000 population the office of county treasurer has been abolished and the duties heretofore performed by the county treasurer are now performed by a bank, designated by the county governing body to act as county depository in accordance with the provisions of Article II, supra. Washington County has a population of less than 56,000 population, Federal Census of 1930. Consequently, the office of county treasurer in Washington County is abolished and the provisions of Article II, supra, as amended, apply in Washington County. Section 316 of Article II, supra, provides the method or manner by which the county governing body shall select a bank within the county to act as county depository in lieu of a county treasurer. This selection is made in December of each year for the following calendar year. It is my understanding that Washington County was unable to designate a bank within the county to act as county depository during the calendar year 1937.

In such a case, the county governing body must, by appropriate resolution, designate some individual to act as treasurer of the county in lieu of the county depository, under such terms and conditions as may be fixed by the county governing body. Section 322, Article II, supra. In December following, the county governing body must make another effort to designate a county depository in lieu of a county treasurer for the next calendar year, and failing in this, must again designate, by appropriate resolution, an individual to act as treasurer in lieu of the county depository, under such terms and conditions as may be fixed by it. It is my understanding that Mrs. Willie Long Mills was the individual designated to so act by appropriate resolution of the county governing body of Washington County for the calendar year 1937, and that she is called the custodian of county funds. Therefore, her bond should have been set by the county governing body in accordance with the provisions of Act No. 191, General Acts 1933, page 203, approved April 20, 1933. Section 11 of said act provides that this bond shall be not less than the largest amount of public funds in the possession of or under the control of such office during the preceding fiscal year. However, Section 15½ of said act provides that if a depository has been designated by the county governing body for the funds coming into the hands of the county treasurer, and it is my understanding that this has been done by your county governing body, the minimum amount of this bond may be fixed at an amount not less than twice the amount of the average daily balance of funds on hand or under the control of such official during that month in the preceding fiscal year when such average daily balance was greatest. This bond should be filed in the office of the judge of probate, as provided by Section 21 of said act.

It is my understanding that upon the application of the various county officials of your county, including the treasurer or custodian of county funds, the county governing body of your county by appropriate resolution designated the Chatom State Bank as a depository in which the county officials might deposit the monies coming into their hands as such officials, in accordance with the provisions of Act No. 60, General Acts 1933, page 51, approved March 10, 1933, and that it required the said Chatom State Bank to give security in the form of certain Washington County, Alabama, Refunding Warrants to secure the safety of the funds to be deposited with the bank by the county treasurer or custodian of county funds, but that no such security was required of said bank for the purpose of securing the safety of the funds to be deposited in it by the other county officials, since all deposits in said bank are insured by the Federal Deposit Insurance Corporation up to \$5,000.00 on each such deposit and the county governing body deemed this to be sufficient security for the funds to be deposited in said bank by the various county officials other than the county treasurer or custodian of county funds. This was within

the legal authority and power of the county governing body of your county. Section 2 of Act No. 60, supra, reads in part as follows:

"Such court shall from time to time by resolution spread upon its minutes, make such requirements as may be deemed necessary for the safety of such funds so deposited, not inconsistent with the general laws of the State."

Therefore, the question of what security will be required by the county governing body of a bank designated by it as a depository for the funds coming into the hands of the various county officials is a matter that addresses itself to the sound discretion of the county governing body. There is nothing before me to indicate that the county governing body of your county has abused its discretion in the premises and its action in this regard is not inconsistent with the general laws of this state. Consequently, they have acted within their legal authority and power in the premises. Of course, in such a case the county governing body should always take care to make such requirements of the bank designated as depository for the funds of the county officials as will be certain to safeguard the funds which come into the hands of said officials.

The provisions of Act No. 30, General Acts 1933, page 19, approved March 8, 1933, which is an act amending Section 317 of the Code of Alabama 1923, in regard to the amount of bond or security that must be given by a bank acting as county depository of a county in lieu of the county treasurer, is not applicable to the situation in your county, since the Chatom State Bank is not so acting, but instead, is merely a depository designated by appropriate resolution of the county governing body, into which the various county officials, including the county treasurer in lieu of a county depository or custodian of county funds, may deposit the monies coming into their hands as such officials, in accordance with the provisions of Act No. 60, supra, for the purpose of protecting such officials from liability on their official bonds in case of the dissipation or loss of such funds because of the insolvency or failure of the said bank.

For a treatment of the general subject of the law in regard to the selection by a county governing body from year to year of a bank within the county to act as county depository in lieu of a county treasurer, or in case the county governing body is unable to designate a bank as such depository, the selection by it of an individual to act as treasurer in lieu thereof, we respectfully refer you to the case of *Jenkins v. State ex rel. Watson*, 219 Ala. 554. You will note from a reading of this decision and the above mentioned sections of the Code which it construes, that a county depository in lieu of a county treasurer or an individual to act as treasurer in lieu of a county depository, must be selected by the county governing body in accordance with the provisions of our statutory law during December of each year for the following calendar year.

We respectfully decline to express an opinion on the question of whether or not the Federal Deposit Insurance Corporation law would insure up to \$5,000.00, deposits made by a county official up to this amount in several different accounts, for instance, an account of the general fund of the county, an account of the Road and Bridge Fund of the county, an account of the Gasoline Tax Fund of the county, an account of the Fine and Forfeiture Fund of the county, etc., since this is a Federal law and must be interpreted by the Federal authorities.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 9, 1938

Hon. John S. Pollard,
Tax Assessor,
Dallas County,
Selma, Alabama.

Homestead exemption—

1. Certificate of credit issued in name of deceased exemptioner on application of husband should be credited on taxes.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I refer to your letter as follows:

"Please advise whether or not the Tax Collector of Dallas County is justified under the law for giving credit to taxpayers with a certificate of credit given by the Tax Assessor to the taxpayer under the following statement of facts:

"1. In this case I am enclosing for your information taxpayer's copy of Exemption Claim No. 2314. You will please note the name of the taxpayer is Massy Cobb. He swears and subscribes before me that the property is owned by five people; that four of the five people live upon the property, and in the same home. Therefore, I have given four-fifths exemption on the total assessed value of the property described. I have set out in the body of the Exemption Claim the description thereof, and have also stated in the body of said claim that the above property is assessed to Nellie Menefield, Abner Childers, Massy Cobb, Mamie Menefield, and Lizzie Sawyer. Massy Cobb claims to be head of this family, and signed the affidavit as such.

"Massy Cobb presented his Certificate of Credit at the time that he asked to be allowed to pay his taxes, and his certificate was not accepted for the reason that Massy Cobb had no assessment in his name, though it did appear in the assessment as shown in the preceding paragraph of this letter. The names appearing on the Collector's Abstract are in the same order as shown on the taxpayer's assessment.

"2. A husband and wife who were occupying their home as of October first nineteen thirty-six, and prior thereto; the property is assessed in the name of the wife, who dies before making her exemption claim. The husband comes before me, and affirms that he and his wife occupied this property as of October first, and as she died prior to making her claim, that he is entitled to the exemption. Whereupon, I issue the claim in his name as taxpayer, and write in the body of the exemption claim the above stated facts.

"3. Mrs. Mamie S. Walker appears before me, stating that the home in which she lives, and has lived and owned for many years, is her own property for her lifetime. This property is assessed to her only daughter, Mrs. Erin W. Wood, as Trustee of all of Mrs. Mamie S. Walker's property. This statement is written in the body of the Exemption Claim.

"In this case, Mr. William M. Polk, Examiner out of the State Tax Commission Office had me send for Mr. Milton O. Wood, the husband of Mrs. Erin W. Wood, who came to the office, and under oath explained to Mr. Polk the reason of the Trusteeship, and took oath that the property

belonged to Mrs. Mamie S. Walker, and that she occupied the same as her homestead. Mr. Polk thereupon approved the claim.

"Every Exemption Claim which I have issued has a number. Every Certificate of Credit bears the same identical number as the Exemption Claim. These numbers I have written in the margin of the Tax Collector's Abstract Book, opposite the names, which correspond exactly with my assessments on which the homestead exemption was granted."

With reference to the first question propounded in your letter, I refer you to an opinion of this office to Hon. T. D. Woodham, Tax Assessor, Dale County, Ozark, Alabama, under date of August 10, 1937, Quarterly Reports of the Attorney General, Vol. VIII, page 66, with special reference to Section (e) thereof, in which I held that a "joint tenant with others of unpartitioned real estate who occupies a portion thereof, is entitled to homestead exemption out of the joint property, but his fractional ownership of the homestead does not enlarge the area of its operation so as to make up in quantity what is wanting in extent of ownership." Please also refer to an opinion of this office to Hon. O. S. Nichols, Tax Assessor, Perry County, Marion, Alabama, under date of July 8, 1937, reported in Vol. VIII, Quarterly Reports of the Attorney General, page 19, in which we held that each joint owner is entitled to his proportionate share of exemption on homestead. These two opinions are full authority for granting the exemption to Massy Cobb, according to the facts outlined in your letter. I pretermit discussion of the right of Massy Cobb to pay his taxes without payment of all the taxes assessed against the joint heirs.

It is my opinion that your second question should be answered in the affirmative. This office held in an opinion to Hon. T. D. Woodham, Tax Assessor, Dale County, Ozark, Alabama, under date of August 10, 1937, Quarterly Reports of the Attorney General, Vol. VIII, page 66, Section (g), that the status of a homestead exemption for the tax year 1936-37 is determined by the status of the property as of October 1, 1936. According to the facts stated in your letter, the wife was living on October 1, 1936, and, if so, the status of her homestead was determined as of that date. The subsequent death of the exemptioner would not defeat the right of her estate to the benefit of the exemption to which she was entitled on October 1, 1936.

It is my opinion that the credit certificate, if not otherwise unlawful, should be credited to the taxes due by the estate of the deceased and that the issuance thereof in the manner indicated in your inquiry was in due conformance with law.

I am unable to answer your third inquiry because the facts therein stated are insufficient for me to determine the validity of claim for exemption. It will be necessary for you to attach a copy of the trust agreement in order that I may determine the several legal phases that might be involved and that grew out of the trust agreement.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 9, 1938

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Counties—

(1) County governing body authorized to pay the salary of an assistant for the Farm Security Administration Program out of the general fund of the county.

(2) County governing body authorized to pay the salary of such assistant out of the sales tax fund only if the proper authorities of the Alabama or Federal Agricultural Extension Service hold the same to be within the meaning of the term "extension services as that term is used in Section 21 of the Sales Tax Act.

(3) County governing body not authorized to pay for the transportation of workers to a Federal Works Progress Administration sewing room project in the county.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of January 24, 1938, which follows:

"At the regular monthly meeting of the Marengo County Board of Revenue on January 11, 1938, the Board Members passed a resolution agreeing to pay the salary of an office assistant for the Farm Security Administration Program in their County.

"(1) Please advise me if the Board has authority to pay the salary of an office assistant for the Farm Security Administration Program?

"(2) If the Board has this authority from what fund should the salary be paid?

"On the same date the Board passed a resolution agreeing to pay \$40.00 per month for transporting women to the Marengo County sewing room.

"(1) Please advise me if the Board of Revenue has authority to appropriate money to pay for transporting workers to the Marengo County sewing room.

"(2) If they have this authority what fund should it be paid from?"

The Farm Security Administration Program, as I understand it, is one to aid and educate by experts indigent farmers. It is my opinion that the payment of the salary referred to in your first question, which is the salary of an assistant for the Program, may lawfully be paid from the general fund of the county. See Subsection 18 of Section 6755, Code of Alabama, 1923. This conclusion is in accordance with the holdings of previous opinions of this office dealing with similar subjects (the general subject of the authority of a county to expend its funds to aid in the promotion of Federal relief projects in the county). See opinions of this office to Hon. B. L. Malone, Judge of Probate, Morgan County, Decatur, Alabama, Biennial Report of the Attorney General, 1932-34, page 595; to Hon. W. H. Lindsey, Judge of Probate, Choctaw County, Butler, Alabama, Biennial Report of the Attorney General, 1932-34, page 629; and to Hon. John S. Golson, Judge of Probate,

Butler County, Greenville, Alabama, Quarterly Report of Attorney General, Vol. IX, page 93.

It is further my opinion that the salary of this assistant for the Farm Security Administration Program may be paid from the Sales Tax Fund if, and only if, it is held by the proper authorities of the Alabama or Federal Agricultural Extension Service to come within the term "extension services" as that term is used in Section 21 of the Sales Tax Act. Section 21 of the Sales Tax Act, which is Act No. 126, General Acts 1936-37, page 125, approved February 23, 1937, provides in pertinent part as follows:

"Provided that the funds divided and distributed to the several counties of the state as hereinabove provided for shall be used exclusively for fulltime health service in cooperation with the State Board of Health and/or the Federal Government; for Public Welfare in cooperation with the State Department of Public Welfare and/or the Federal Government; and for extension services in cooperation with the Alabama Agricultural Extension Service and/or the Federal Government, at the discretion of the Commissioners Court, Boards of Revenue, or other governing bodies of the several counties of the State."

In construing this provision of the Sales Tax Act, the Supreme Court of Alabama in the recently decided case of Tuscaloosa County v. Chester Walker, Judge of Probate, Supreme Court Ms., held that it was the legislative intent that the state agencies mentioned therein, and not the various county governing bodies, were to exercise their judgment as to whether or not the expenditures by the various counties from the Sales Tax Fund were within the meaning of the terms "public health," "public welfare," and "agricultural extension services". Therefore, the salary of said assistant for the Farm Security Administration Program may be paid from the Sales Tax Fund of the county only provided the same is held by the proper authorities of the Alabama or Federal Extension Service to be within the meaning of the term "extension services" as that term is used in Section 21 of the Sales Tax Act, *supra*.

As to your questions in regard to the appropriation of money by the county to be used to pay for the transportation of workers to a Works Progress Administration sewing room project in your county, I know of no authority of law for such payment. While this is termed a Federal relief project, I do not understand that the payment of the transportation of the workers to this project is a part of the same. However meritorious and deserving this appropriation for transportation may be, the county governing body, nevertheless, is without authority of law to expend its funds therefor without a specific provision of law. I know of no such provision of law that would authorize this expenditure.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 9, 1938

Hon. J. Lee Smith,
Judge of Probate,
Chilton County,
Clanton, Alabama.

Counties—Equitable claims and demands—Tractor company which, in good faith, advanced tractor for the use of the county may be re-

imbursed for the rental or for the value thereof by the county governing body under Section 186 of the Code of 1923.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"On or about January 1936, the Commissioners Court of Chilton County entered into an agreement with the State Highway Department to pave or black top the State Highway between a point four miles West of Clanton and the Chilton County line, a distance of about twenty-two miles, the county paying and bearing one-third of the expenses and shortly thereafter work was commenced upon this project. The agreement with the State Highway Department provided that the county might use on said project any of its road machinery and would accordingly be given credit upon settlement with the State Highway Department for a fair rental for the use of said machinery. A tentative order was executed by one of the County Commissioners with J. D. Pittman Tractor Company of Birmingham, Alabama, for the purchase of a Deisel tractor, subject to the approval of the Commissioners Court and subject to the commencement of said Three-way Project on the Clanton-Selma state road.

"Under a Local Supervisor's Bill, Acts 1936, page 4, a supervisor was appointed for Chilton County and the supervisor assumed office on May 1, 1936. Also a Local Act was approved March 10, 1936, Acts 1936, at page 3, providing that machinery and supplies purchased for Chilton County, in an amount exceeding \$150.00 must first be advertised. Without an order being passed for the purchasing of said Deisel tractor, and at the request of the supervisor (a fact which is denied by him) a Deisel tractor was delivered to Chilton County about the 26th of May, 1936 and commenced work on the said Three-way Project and continued work on the project until probably ninety days ago when the work was finished, said tractor has also been used on the county roads under the supervision of the supervisor. The State Highway Department admit a credit due Chilton County for the use of said tractor of an amount around \$3,000.00, and also said tractor has been used for probably ninety days on the county roads. The J. D. Pittman Tractor Company has been paid no amount or rent and no compensation has been paid to them either by the State or County for the use of said Deisel tractor, which was a new machine. The local supervisor's bill provides that the Commissioners Court may purchase machinery and supplies, etc., upon requisition by the Road Supervisor.

"Will you, therefore, please advise me whether or not the Commissioners Court can legally pay the J. D. Pittman Tractor Company a fair and reasonable amount for rental for the use of said Deisel tractor on said Three-way Project and also will you please advise me whether or not the Court of County Commissioners can legally pay the J. D. Pittman Tractor Company a reasonable rental for the use of said tractor on the county roads."

I have examined the local statutes cited in your request for opinion, but have concluded that the real basis for the payment by Chilton County of the demand of the Pittman Tractor Company is the authority contained in Section 186 of the Code of 1923.

It provides, in part:

"186. Equitable claims or demands against county; mode of payment provided.—The court of county commissioners, board of revenue, or other governing body of any county may appropriate from the general or special funds of the county, such sums of money as such governing body shall determine from time to time for the following purposes: First, To reimburse any person, firm or corporation, who in good faith has performed service, advanced money, or property for the use of the county, or who has in good faith bought county warrants issued under invalid acts of the legislature for tick eradication or for building public roads. * * *

It is, therefore, my opinion that the county governing body of Chilton County may legally pay to the tractor company either the reasonable rental value of the said tractor or may pay the reasonable value and accept title thereto.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 11, 1938

Brigadier General John C. Coleman,
National Guard of Alabama,
Montgomery, Alabama.

Alabama Beverage Control Act—Exemptions from taxation.

In view of Section 60 of the Alabama Beverage Control Act (Acts of 1936-37, Special Session, p. 40), National Guard Canteens are not exempt from payment of tax levied on sales of alcoholic beverages, notwithstanding Section 113 of the Military Act of 1936 (Acts of 1936, Extra Session, p. 141).

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"Your opinion is requested as to whether the National Guard Canteen run by the National Guard of Alabama, or a lessee, is required to pay tax on intoxicating liquors."

In my opinion, your inquiry must be answered in the affirmative, that is to say, there is no exemption from the taxation.

Section 113 of the Military Code of 1936, Acts Extra Session 1936, p. 141, provides:

"POST EXCHANGES AND CANTEENS: All post exchanges, or canteens owned, operated, and run exclusively by National Guard units shall be exempt from the payment of all state, county, city or town licenses and taxes, and shall be exempt from payment of tobacco and gasoline tax to the state, county, city or town when operated in accordance with such rules and regulations as the Adjutant General may provide and the Governor may approve, when the profits of such canteens or exchanges go to the National Guard or Naval Militia Units and not to the operators of such enterprises."

This provision was enacted into the law on April 22, 1936.

The Alabama Beverage Control Act was enacted on February 2, 1937. By Section 60 therein it is provided:

"The exemptions from alcoholic beverage tax enumerated and defined herein, granted in the foregoing Act are hereby declared to be exclusive and any laws or parts of laws, general, special or local, granting or attempting to grant any exemptions from alcoholic beverage tax, except as provided in this Act, are hereby specifically repealed."

There is no provision in the Alabama Beverage Control Act for the exemption of canteens operated by National Guard organizations or their concessionaires from the payment of license taxes therein fixed.

It must be noted that the inquiry to which this request is directed does not include the factor that the National Guard Canteens inquired about are operated upon Military Reservations belonging to the United States, situated within the State of Alabama. The former opinions of this office directed to the question of the State regulation of Alcoholic Liquors upon Government Reservations have no application to questions dealt with in this opinion.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 11, 1938

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Sheriff—Costs and Fees—

In Montgomery County, the fee or fees provided by Section 4782, Code of Alabama 1923 for the officer making the seizure of property illegally used for the transportation of liquor, should be turned over to the Sheriff to be covered by him into the county treasury, if the officer making the seizure was the sheriff or one of his salaried deputies, whether the property is sold under decree of condemnation or by advertisement as provided in Section 4781.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of January 26, 1938, which follows:

"By Constitutional amendment, proposed by Act of 1915, (H. B. 108) and proclaimed as ratified November 22, 1916, (Proclamation Record, page 519), the Sheriff and deputies of Montgomery County were placed on salaries.

"This Act provides among other things:

"The Sheriff shall receive amounts now provided by law and shall cover the same into the County Treasury of Montgomery County—. The above named amounts shall be in lieu of all compensations and allowances to the respective named officers. These amounts shall be paid out of the County Treasury of Montgomery County as the salaries of all other County officers are paid. The above named officers shall collect the

fees heretofore collected by them and shall cover such fees into the County Treasury on the first Monday of each month.'

"Section 4782, Code of 1923 provides that in the seizure of personal property of any description illegally used for transporting prohibited liquors in the State when sold under decree of condemnation, or by an officer under advertisement, the proceeds shall go, after paying certain other expenses named in the statute; one-fourth to the officer making the seizure or furnishing the proof.

"Since the Sheriff and deputies of Montgomery County have been placed on a salary:

"(1) Is it legal and proper for the Register in cases where property is sold under decree of condemnation to turn such fees of the officer, or officers, making the seizure over to the Sheriff to cover into the County Treasurer, or to pay same direct to the seizure officer or officers.

"(2) Where property is sold by the Sheriff or Deputies of Montgomery County under advertisement according to the provisions of Section 4781, Code of 1923, should such fees as referred to supra be covered into the County Treasury of Montgomery County or accrue to the account and benefit of the seizure officer or officers?

"Please refer to Vol. 6, page 15, Quarterly Report of the Attorney General, January 1, 1937, March 31, 1937."

The amendment to which you refer in your letter of inquiry, which is amendment No. 4, is generally referred to as the Montgomery County Salary Amendment. As stated by you, it was proposed by an act of 1915, (H. B. 108) and proclaimed ratified November 22, 1916 (Proclamation Record, page 519). This amendment places the officers of Montgomery County enumerated therein, which includes the Sheriff and his deputies, on a salary. It provides in part as follows:

"The sheriff shall receive amounts now provided by law, and shall cover the same into the County Treasury of Montgomery County, and the Board of Revenue of Montgomery County shall pay out of the County Treasury of Montgomery County the expenses incurred by the Sheriff in feeding said prisoners. The above named amounts shall be in lieu of all compensations and allowances to the respective named officers. These amounts shall be paid out of the County Treasury of Montgomery County as the salaries of other County officers are paid. The above named officers shall collect the fees heretofore collected by them and shall cover such fees into the County Treasury on the first Monday of each month."

Section 4782 of the Code of Alabama, 1923, which is the section providing the fee to the officer making the seizure of property illegally used for the transportation of liquor, reads as follows:

"4782. Proceeds of sale of contraband or forfeited property; distribution and disposition of funds.—The proceeds of the sale of any such property forfeited to the state, whether sold by court decree or by an officer under advertisement, shall, after paying all expenses in the cause, and of advertisement, as the case may be, including the costs of seizure and of keeping the property pending the proceedings, (shall) be applied as follows: one-fourth to the officer making the seizure and furnishing the proof, but if proof be furnished by another person than the officer making the seizure, one-eighth of the proceeds shall go to the furnisher of the proof and one-eighth to the officer making the seizure and assisting in the condemnation case, or who makes the sale under advertise-

ment. The remainder of the proceeds shall be paid into the treasury of the state as a law enforcement fund to be used and applied for the enforcement of state laws under the supervision and control of the governor, same to be paid out on warrant of the auditor on a bill against the state approved by the attorney general and governor."

In view of these provisions of the Constitution and statutes of our state, it is my opinion that in Montgomery County, when the officer making the seizure of property illegally used for transporting liquor is the Sheriff or one of his salaried deputies, the fee provided by Section 4782, supra, for the officer making the seizure, should be paid to the Sheriff to be covered by him into the County Treasury. This should be done regardless of whether the property is sold under decree of condemnation or advertisement as provided by Section 4781 of the Code of Alabama, 1923.

This conclusion is in accordance with the holding of an opinion of this office to Hon. John D. McNeel, State Comptroller, Capitol, under date of March 25, 1935, Opinions of the Attorney General, Office Edition, Vol. 3-A, page 62, which holds that the Sheriff of Montgomery County or his salaried deputies are not entitled to the fees provided by Section 4626 of the Code of Alabama, 1923 and Section 4659 of the Code of Alabama, 1923, as amended by an act of the Legislature of 1933, approved April 20, 1933, but that said fees should be paid to the Sheriff to be covered in turn by him into the County Treasury. The principle involved in that opinion and here is the same.

It is also in accordance with the holding of an opinion of this office to Hon. James C. Brown, Register, Circuit Court, Tuscaloosa County, Tuscaloosa, Alabama, under date of January 7, 1937, Quarterly Report of Attorney General, Vol. VI, page 16, which holds that all fees including seizure fees in prohibition cases when the seizure is made by the Sheriff or any of his salaried deputies must be covered into the County Treasury of Tuscaloosa County under Section 8 of an act approved April 10, 1937, Local Acts, 1936, page 53. This act placed the Sheriff of Tuscaloosa County and his deputies on a salary and Section 8 thereof reads as follows:

"That when this Act goes into effect said Sheriffs shall continue to collect all legal charges, costs, fees, compensations and allowances heretofore or hereafter authorized to be collected by him, and shall pay the same into the county treasury on the first Monday of each month after this act becomes effective."

It is true that the above quoted provision of the act applying to Tuscaloosa County refers to legal charges, costs, fees, compensations and allowances "heretofore or hereafter authorized to be collected" whereas the above quoted provision of the constitutional amendment applicable to Montgomery County refers to fees "heretofore collected." However, this office spoke as follows in regard to this provision of the Montgomery County salary amendment in an opinion to Hon. W. W. Hill, Judge of Probate, Montgomery County, Montgomery, Alabama, under date of March 9, 1936, Quarterly Report of Attorney General, Vol. II, page 293:

"It is true the amendment says 'heretofore collected' but I think it is clear the legislative intent was that all fees collected by the Judge of Probate (the fee there under consideration was a fee which the Probate Judge had been authorized to collect by an act passed subsequent to the adoption of the Montgomery County Salary Amendment), that is, all fees emanating from your office as Probate Judge, must be transmitted to the County Treasury and cannot be diverted by an act of the legislature to a different source."

The same rule is applicable to a fee authorized to be collected by a Sheriff or one of his salaried deputies by an act passed subsequent to the adoption of said amendment. Therefore, the fact that Section 4782 of the Code of 1923 is the codification of a section of an act of 1919 could make no difference in the matter here under consideration.

However, if the officers making the seizure are deputy sheriffs of Montgomery County who are not on a salary then the fee provided by Section 4782, *supra*, would go to the deputies making the seizure and not into the County Treasury. See opinion to Mr. McNeel, *supra*; to Hon. F. M. Shamblin, Sheriff, Tuscaloosa County, Tuscaloosa, Alabama, under date of August 25, 1936, Quarterly Report of Attorney General, Vol. IV, page 154; and opinion to Mr. Brown, *supra*.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 11, 1938

Hon. J. A. Carnley,
Probate Judge,
Coffee County,
Enterprise, Alabama.

Taxation—Trailer License Tag—

An applicant for a trailer license tag provided for by Schedule 158.11 of Section 348 of the Revenue Laws of 1935, is not entitled to a monthly declining rate.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I am in receipt of your letter of recent date wherein you request the following:

"Schedule 158.11 of the Revenue Code of Alabama, reads as follows—'Every small trailer and semi-trailer shall pay a license tax of fifty per cent (50%) of the cost of the license tax on the motor vehicle by which it is drawn. The purchaser shall specify the truck to which it is to be attached and shall pay one-half ($\frac{1}{2}$) of the amount of that license.'

"If a person who has owned a truck and purchased tag for said truck in October, applies for trailer tag in February, or in any other month, will I be permitted or have authority to issue to said applicant a tag for the remainder of the fiscal year, or an eight month tag, or is he required to pay full year price? Would it make any difference if the man purchased both truck and trailer and applies during the same month for tags, will he be permitted to purchase tags for both truck and trailer on monthly declining basis?

"It seems that trailer tags should be issued on monthly declining basis, but the receipt books furnished by the Tax Commission only show they can be issued for whole year and half year."

The issuance of a license tag for a trailer is provided for by Schedule 158.11 of Section 348 of the Revenue Laws of 1935 at p. 523. This provides that

the cost of a trailer tag is one-half of the cost of a license tag for the vehicle to which the trailer will be attached. The provisions of the law in reference to a monthly declining rate in the purchase of license tags are found first in the Laws of 1935 at p. 1141 but this provision is only for "automobiles" and "motor cars" kept for private use. The only other provision for a monthly declining rate is found in the Laws of 1936-37 at p. 108 which amends Schedule 158.5 of Section 348 of the Revenue Laws of 1935. Again this provision applies only to "motor trucks". A trailer, small trailer or semi-trailer as used in Schedule 158.11 is defined in Schedule 158 of Chapter 6, Article 13, Revenue Laws of 1935, at p. 517. It is impossible therefore to apply the provisions of the law for a monthly declining rate to a trailer which is covered by Schedule 158.11. The only reduction that can be allowed by law in the purchase of a license tag for a trailer is that provided in Schedule 158.13 of Section 348, which allows the purchase of a tag for a "motor vehicle" for one-half year under the conditions as prescribed in Section 158.13. Under the term "Motor Vehicle"; the definition reads: "Every vehicle as herein described which is self-propelled, or which is drawn by a self-propelled vehicle." So that under the facts stated, one who applies for a trailer tag in February should have to pay the license on a full year basis. A trailer tag can be procured for one-half year only as provided in Schedule 158.13, which reads in part:

"One-half ($\frac{1}{2}$) of the license herein provided for shall be paid plus one dollar where the motor vehicle is acquired or brought into the State on or after April 1 of any year, or is not used or operated between the period from October 1 through March 31 following * * *

It would make no difference if the truck and trailer were purchased at the same time and application made for license tags for both vehicles at the same time.

A monthly declining rate basis is specifically provided for motor trucks by the Laws of 1936-37 at p. 108. And this act is fully explained by an opinion of this office to Hon. F. B. Thompson, Judge of Probate, Clay County, dated February 7, 1938, a copy of which I am enclosing for your attention.

It is therefore my opinion that the provisions for a monthly declining rate cannot be applied in the case of a trailer. The Supreme Court many times has held (see *State vs. Kidd*, 125 Ala. 413, 28 So. 480), that, "Exemptions from taxation must be clear and unambiguous and may not be deducted and allowed from language of doubtful import."

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 11, 1938

Hon. Henry S. Long, Chairman,
State Tax Commission,
Capitol.

Financial Institution Excise Tax Fund—May be distributed to various cities and towns in accordance with Sections 346.5 of the Revenue Act of 1935, by the State Tax Commission before September 1st of each year in its administrative discretion provided other requirements of the statute will have been met.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of your letter of March 9, 1938, which is as follows:

"Section 346.5 of Article XII of the 1935 Revenue Code provides that funds credited to the Financial Institution's Excise Tax Fund, after all expenses incurred by the State Tax Commission in the administration of this tax have been paid, shall be distributed to the various cities and counties on the First day of September of each year.

"There appears to be nothing in this Section of the law which would prevent a distribution of these funds, as collected, provided that the expenses of administration are taken care of.

"It will be appreciated if you will give us an opinion covering the distribution of these funds prior to September First of each year."

Your inquiry involves an interpretation of Section 346.5 of the Revenue Act of 1935, which provides for the payment of excise tax on financial institutions and the distribution of financial excise tax funds. The pertinent part of said section, as pertains to your inquiry, provides as follows:

"* * * All expenses incurred by the State Tax Commission in the administration of this Article shall be paid out of the money collected under the provisions hereof. The amount remaining in said Financial Institution Excise Tax Fund, after all expenses incurred in the administration of this article have been paid, shall, on the first day of September, 1936, and on the first day of September in each year thereafter be distributed as follows: * * *"

Although the statute makes September 1st of a year the date on which the distribution to the cities and counties shall be made, I see no objection to making said distribution before that time if the other provisions of the statute have been met. Such, in my judgment, may be termed a matter of administrative procedure.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 17, 1938

Hon. J. P. Mitchell,
Judge of Probate,
Henry County,
Abbeville, Alabama.

Counties—County governing body of Henry County held to have authority to enter into contract with the tax collector of Henry County, who has appointed a deputy or deputies to act for him, pursuant to the authority vested in him by Section 158 of the 1935 Revenue Act, and who is also an attorney licensed to practice law, to perform legal services for the county in matters not pertaining to his official duties as tax collector, under and by virtue of Section 5024, Code of Alabama, 1923, as that section was amended by Act 193, General Acts 1936-37, page 225, approved March 2, 1937.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter, which follows:

"In your Quarterly Reports, Volume VIII, at page 108, you quote Section 5024 of the Code of 1923.

"Henry County recently contracted with the Tax Collector, who is also a practicing attorney, to represent the County in an unjunction proceeding in the Circuit and the Supreme Courts. It appeared that, under amended Section 5024 (Page 225, Extra Session 1936-1937) the Commissioners were acting within the law in making such contract.

"In view of the import of the decision which you arrive at in the opinion referred to above it would be appreciated if you would be good enough to inform me whether the Commissioners' Court has a legal right to pay the Tax Collector for legal work of the nature described above."

From other information before me, it appears that the tax collector of your county has appointed a deputy to act for him, and that, as a matter of fact, he, himself, devotes a very small portion of his time to the work or duties of said office, this work being done, or these duties being performed for him by his deputy.

Prior to the enactment of Act No. 193, General Acts 1936-1937, page 225, approved March 2, 1937, which said act amended Section 5024 of the Code of 1923, it would have been unlawful for the county governing body of your county to enter into a contract with the tax collector of your county, who is also an attorney licensed to practice law, for the performance of legal services to the county.

Section 5024 of the Code of 1923, prior to the amendatory act, *supra*, read as follows:

"5024. County officer interested in county contracts.—Any judges of probate, tax collector, tax assessor, sheriff, clerk of the circuit court, solicitor, or county treasurer, members of the court of county commissioners or boards of revenue, or any other state or county officer who takes any contract for work or services of the county, or is employed in any way under such contract, or is interested in any contract for hire of county convicts, or sells any goods or supplies to the county, or is in any wise pecuniarily interested in any such contract or sale, as principal or agent, must on conviction, be fined not less than fifty nor more than one thousand dollars, and may be imprisoned in the county jail, or sentenced to hard labor for the county for not exceeding twelve months; but nothing in this section shall apply to the sale or purchase of drugs or medicine for the use of prisoners or paupers"

This section was construed in the case of **Pitts v. Chilton County**, 173 So. 94, which is an Alabama Court of Appeals decision, certiorari denied in **Pitts v. Chilton County**, 173 So. 95, which is an Alabama Supreme Court decision, and it was held in those cases that an attorney who was also an officer could not enter into a contract with the county for the performance of legal services.

However, a short time after the above cited case was decided by the Court of Appeals, and, in fact, before it was passed on by the Supreme Court, and obviously to meet the situation resulting from said decision, the legislature passed and the Governor approved the 1936-37 Act, *supra*, which amended Section 5024. That section, as now amended, reads as follows:

"5024. County officers interested in county contracts, or hire of county convicts.—Any judge of probate, tax collector, tax assessor, sheriff, clerk of the circuit court, solicitor, or county treasurer, members of the court of county commissioners or board of revenue, or any other state or county officer who takes any contract, for work or services of the county, or is employed in any way under such contract, or is interested in any contract for hire of county convicts, or sells any goods or supplies to the county, or is in any wise pecuniarily interested in any such contract or sale, as principal or agent, must, on conviction, be fined not less than fifty nor more than one thousand dollars, and may be imprisoned in the county jail, or sentenced to hard labor for the County for not exceeding twelve months; but nothing in this section shall apply to the sale or purchase of drugs or medicine for the use of prisoners or paupers, but this section shall not be construed to prevent the Court of County Commissioners, Board of Revenue, County Commission or other governing body of the County from employing as attorney to such governing body an attorney who holds an office which does not preclude him from practicing law and does not require his full time and for which, as such officer, he is compensated on a per diem or fee basis, nor shall it be construed to prevent the Treasurer in lieu of a County depository from being employed as clerk to the Court of County Commissioners, Board of Revenue, County Commission or other governing body of the County."

Thus, it can be seen that the amendatory act had the effect of removing the prohibitions contained in Section 5024, insofar as the same applied to the employment by a county governing body as attorney to such governing body "an attorney who holds an office which does not preclude him from practicing law and does not require his full time and for which, as such officer, he is compensated on a per diem or fee basis." Therefore, if the tax collector of your county comes within the purview of the exception contained in said amendatory act, then the county governing body of your county had the legal right to make a contract with him for the performance of legal services for the county.

In my opinion, a person otherwise qualified to practice law is not precluded from the practice merely because of the fact that he holds the office of tax collector. Chapter 79 of the Code of Alabama, 1923, consisting of Sections 3308 et seq., is the chapter dealing with attorneys at law and the practice of same, and contains a number of sections and provisions prohibiting the practice of law by certain officers. However, there is no prohibition contained therein against a tax collector practicing law, nor am I able to find any such prohibition in any of the statutes of our State.

The first sentence of Section 157 of the 1935 Revenue Act provides as follows: "The tax collector shall keep his office open at the courthouse all the year round." In the absence of statutory provisions showing otherwise, this would seem to indicate that the office of tax collector is one that requires the "full time" of the person holding the same.

However, the next sentence of said Section reads as follows: "In all counties of the State the tax collector shall be required, between the first day of October and the first day of January of each year to visit each precinct in the county by himself or by deputy to collect the taxes, and he shall give the same notice of such appointments as is given by the tax assessor;" and section 158 of the 1935 Revenue Act reads:

"The Tax Collector is authorized to appoint deputies, and the acts of such deputies shall be recognized as his acts, and he shall be responsible for any loss sustained by any taxpayer, or by the State or County, by

reason of the acts done by such deputies in the line of their powers and duties. Such deputies shall receive no compensation for their services out of the State or county revenue, except as otherwise provided by law." (All emphasis ours).

Section 23 of said Act provides the method or manner of compensating such deputies and the maximum amount allowed for that purpose.

It seems very clear to me from these statutory provisions that a tax collector who exercises the authority vested in him by Section 158, *supra*, to appoint a deputy or deputies to act for him, does not occupy an office that requires his "full time", notwithstanding the fact that his office must be kept open all the year round.

It is so well known as to need no citation of authority that tax collectors, under the general law of the State, and Henry County in this respect operates under the general law, are compensated on the fee basis, the maximum amount of the fees allowed to the tax collector being governed by Section 23 of the 1935 Revenue Act.

Therefore, it is my opinion that the tax collector of Henry County, who is an attorney, and who has appointed a deputy to act for him, pursuant to the provisions of Section 158 of the 1935 Revenue Act, *supra*, comes within the exception contained in Section 5024 as now amended, *supra*, which removes the prohibitions contained in said section insofar as they might pertain to his employment by the county governing body of Henry County for the performance of legal services for the county.

It necessarily follows, the county governing body having the power to employ an attorney in the premises, that it had the right to employ the tax collector as such attorney and has the authority to pay him for the reasonable value of the legal services rendered to the county by him, according to the terms of the contract entered into by him and said county governing body.

Of course, in such a case, the legal services performed by the tax collector for Henry County could not be connected with the duties of the tax collector, for he is required by virtue of his office to perform all of these duties, and would not be entitled to extra compensation therefor, nor could they be such as would interfere with the full and proper performance of the duties of his office.

This opinion in no way conflicts with the opinion of this office to Hon. D. R. Boyd, Deputy Solicitor of Randolph County, Roanoke, Alabama, Quarterly Report of the Attorney General, Vol. VIII, p. 108, which said opinion is referred to in your letter of inquiry. It can be seen from a reading of that opinion that the legal services performed by the Deputy Solicitor of Randolph County there considered were performed prior to the passage of the act above referred to amending Section 5024 of the Code of 1923, and that Section 5024 as it read prior to the time of the passage of the amendatory act, and not Section 5024 as it now reads, was the then applicable law on this subject.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 18, 1938

Hon. J. F. Laseter,
Judge of Probate,
Barbour County,
Eufaula, Alabama.

Mortgages made by municipalities of this state may be admitted to record in the office of the probate judges without payment of any tax upon debt secured thereby or any other fee or charge, except recordation charges.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt of your letter of March 17, 1938, which is as follows:

"Some days ago the City of Eufaula filed for record in my office a mortgage given by it to secure certain bonded indebtedness.

"On June 1, 1896, the City gave a mortgage to secure \$50,000 of bond. The mortgage filed for record a few days ago embraces the same indebtedness as was secured by the first mortgage. In addition thereto the City gave the mortgage to secure \$40,000 in bonds. All of the foregoing was done by the City in refunding its debts of long standing. No money passed for the mortgage recently filed.

"The City insists that it does not owe any mortgage tax on the mortgage recently filed for record, which mortgage amounts to the sum of \$90,000. I hope the law is such that the City will not have to pay this tax. However, I feel that I ought to ask your opinion as to whether the City is liable to the mortgage tax. Please advise me.

"This letter will be presented to you by Mr. Lee J. Clayton, who is City Attorney of Eufaula. He can, and will, give you any further information that you may desire."

I am of the opinion that you are not required to collect any tax or charge of any kind for the recordation of the mortgage described by you, except the actual cost of recordation.

I refer you to Section 2294(63), Code of Alabama 1928, which is as follows:

"MORTGAGE OF PUBLIC PROPERTY.—Any county or municipality of this state may mortgage any public property for the payment of any debt contracted in connection with such mortgaged property either originally or as a renewal, and such mortgage shall be admitted to record in the office of the probate judge of any county of this state without the payment of any tax upon the debt secured thereby, or any other fee or charge except the costs of recording the instrument at the rate fixed by law."

In my judgment, the above quoted provision of law definitely answers your question.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 18, 1938

Miss Loula Dunn, Commissioner,
Department of Public Welfare,
Montgomery, Alabama.

Public Welfare—Old Age Assistance to Confederate Pensioners—

1. State Department authorized to make investigation to determine whether Confederate Pensioner has complied with eligibility requirements of Old Age Assistance Act (General Acts 1935, page 967, as amended), and finding such requirements met may make initial award and subsequent awards to Confederate Pensioners on own motion without necessity of first having application filed with and passed upon by County Board.

2. County Department authorized to reduce or cancel the amount of the pensions so granted, as provided by Section 10 of said Act, subject to review as therein provided.

Opinion by Assistant Attorney General Loeb.

Dear Miss Dunn:

I have your letter of March 17, 1938, in which you request my opinion as follows:

"I would appreciate your opinion as to whether or not under the provisions of Section 8 of an Act approved September 14, 1935, known as the Old Age Assistance Act (General Acts 1935, page 967) as amended by Act No. 143, S. B. 80, approved March 4, 1937, the State Department of Public Welfare is authorized to make the investigation to determine if the requirements of Section 3 have been complied with and if complied with to make the initial award and subsequent awards to Confederate pensioners on its own motion without the necessity of first having the applications filed with and passed upon by the County Board.

"There is some inquiry as to whether our procedure in the following particulars is in compliance with the Act:

"1. Need the application filed by the State Department on behalf of a Confederate pensioner be filed directly with the County Department?

"2. Need the initial award and subsequent redeterminations be made by the County Department and reach the State Department only through review or appeal?

"We feel that under the authority conferred by Section 8 and under the powers granted under Section 15 that the State Department's action is in full compliance with the Act referred to hereinabove."

In my opinion, the State Department of Public Welfare has authority, as will be shown infra, to make the investigation to determine if the requirements of Section 3 of Act No. 448, approved September 14, 1935 (General Acts of 1935, page 967), as amended by Act No. 143, approved March 4, 1937 (General Acts 1936-37, page 158), have been complied with, and if the State Department ascertains from such investigation that the requirements of Section 3 have been met, the Department is authorized to make the initial award and subsequent awards to Confederate pensioners on its own motion without the necessity of first having the application filed with and passed upon by the County Board of Public Welfare.

This office has heretofore held in an opinion rendered to your department under date of March 18, 1936, Quarterly Report of the Attorney General, Volume II, page 308, that when the Confederate pensioner fails to make application for old age assistance, the State Department of Public Welfare may make such investigation as in its discretion it may deem most suitable. This opinion grants authority to the State Department of Public Welfare to make a complete investigation of the Confederate pensioner's income, residence, legally responsible relatives. etc.

This brings us to the more serious question of whether or not, having made the investigation and determined therefrom that the Confederate pensioner has met the requirements of Section 3 of the Old Age Assistance Act, as amended, it is then necessary that the application be filed with the County Board of Public Welfare by the State Department and that there be another investigation and consequent approval, disapproval or amendment of the award.

A determination of the foregoing question will depend upon the interpretation of Section 17 of Act No. 448, supra, as amended. This section provides as follows:

"Section 17. Any person entitled to any pension under Article 1 of Chapter 55 of the Code of Alabama of 1923, as amended, (Confederate Pensions) who may also be entitled to an old age pension under the terms of this Act, shall be required to make application for a pension as herein provided. Any pension actually received by any such person under the terms of this act shall be deducted from the pension due such person under the provisions of said Article 1 of Chapter 55, of the Code of Alabama of 1923, as amended (Confederate Pensions). If any such person shall fail to make such application hereunder on or before March 1, 1936, the State Department shall as soon as practicable thereafter, make application on his behalf in the county wherein he resides, **and such application shall thereupon be heard and passed upon as if filed by such person himself.** * * *

At first blush it would appear that the underlined portion of the foregoing section would require that after the application has been made by the State Department the same procedure must be followed as in the case of all other applications for old age assistance. It would appear, however, from a reading of the other sections of the Act, that such a procedure must necessarily result in much duplication and confusion so as to lead to the inevitable conclusion that it was not the legislative intent that applications filed by the State Department on behalf of Confederate pensioners should be handled through the circuitous route followed by other old age pension applications.

It has been well stated that in determining the legislative intent it is permissible to look to the context of the Act and all of its provisions, and, if possible, give the Act effect according to the intent so expressed. We may also look to the conditions which led to the enactment of the statute, the history of the statute and to material surrounding circumstances. **Henry v. McCormack Bros. Motor Car Co.**, 232 Ala. 196, 167 So. 256; 18 Ala. Dig., Stat., Key Nos. 208, 214, 215 and 217.

Examining the Old Age Assistance Act, and its amendments, in the light of the foregoing rules of construction, we note at the outset that the Act was passed and adopted in order to comply with Title 1 of the Federal Social Security Act, approved August 14, 1935, and to enable the State of Alabama to participate in Federal grants of public funds for matching State funds used for old age assistance.

Section 8 of the State Old Age Assistance Act was specifically drawn to comply with Section 2(a) (3 and 4) of Title 1 of the Social Security Act, which provides:

"A State plan for old age assistance must * * * (3) either provide for the establishment or designation of a single State agency to administer the plan, or provide for the establishment or designation of a single State agency to supervise the administration of the plan; (4) provide for granting to any individual, whose claim for old age assistance is denied, an opportunity for a fair hearing before such State Agency."

To this end it was provided that the duty was imposed upon the State Department of Public Welfare by Section 8 to review all disallowances and all awards, on its own motion. By Section 15 of the State Act, the State Department is given the authority and required to supervise the administration of old age pensions under the Act, and to make such necessary rules and regulations for the carrying out of the provisions of the Act as to insure that "the spirit and purpose of the Act may be complied with."

The provisions of the Old Age Assistance Act with reference to the handling of Confederate pensions and the handling of other old age cases is quite different, as will be seen by the following analysis:

Application. Application for Confederate pensions is made by the State Department of Public Welfare for every pensioner considered eligible after investigation by the State Department under Section 17.

Application for other old age cases is made under Section 5 by the applicant.

Investigation. Investigation of the qualifications of Confederate pensioners is made by the State Department under the authority of the opinion hereinabove cited.

Investigation of other old age cases is made by the County Director under the authority given him by Section 5 of the Act and by the County Department of Public Welfare, if said department deems further investigation necessary.

Approval and Review. Under Section 5 of the Act, the County Director presents all cases with a recommended award to the County Board which is charged with the approval, disapproval or amendment of such award. Section 7 gives the applicant the right to appeal from this ruling to the State Department.

Under a strict construction of the words found in Section 17 hereinabove referred to, the Confederate pensioner who is an applicant for old age assistance would be placed in the anomalous position of having his appeal from the decision of the County Board heard by the very organization which made the application for him. Thus the State Department of Public Welfare in such cases would be both the appellant and the appellate tribunal. Certainly no such ridiculous situation could have been contemplated by the Legislature.

Moreover, the Old Age Assistance Act provides in Section 8 that the State Department may in such cases as it sees fit "make such decision as to the granting of any pension and the amount and terms thereof as in its opinion is justified by the facts. This, in my judgment, would give the State Department ample authority to set the amount of the award made to a Confederate pensioner at any amount which it finds suitable.

A close analysis of the foregoing differences found in the Act concerning the method of handling the applications of Confederate pensioners and those of other old age cases, leads to the inevitable conclusion that it was the legislative intent that the applications of Confederate pensioners, their approval and the award made thereon, should be handled through the State Department rather than through the various county boards.

The foregoing conclusions are strengthened by the fact that whereas the counties must match the State funds in the payment of old age assistance awards to other applicants for old age assistance, and are therefore rightfully entitled to have a hand in selecting the parties to whom such funds may be granted, in the case of Confederate pensioners, all of the funds available for old age assistance are provided by the State and Federal Government. (Sec. 16). Thus, the reason for approval by the county disappears.

As further evidence of the intent of the Legislature that the State Department should have full and complete control of the administration of old age assistance to Confederate pensioners, witness the fact that the Legislature, meeting in Special Session in 1936-1937, enacted Act No. 172, which Act was approved on March 1, 1937, (General Acts 1936-37, page 204) which provided that the State Department of Public Welfare "shall perform all duties incident to the payment of pensions to those persons entitled thereto under the provisions of Chapter 55, Article 1 of the Code of Alabama of 1923, as amended." This Act imposed a duty upon the State Department of Public Welfare to draw all warrants in favor of each Confederate pensioner. It is a matter of legislative history that this act was drawn and enacted in order to insure that the State of Alabama, through its State Department of Public Welfare, would share in the matching of the funds provided by the Federal Government, not only in the usual line of old age assistance cases, but also in connection with the payment of old age assistance monies to Confederate pensioners. The Legislature definitely demonstrated by the adoption of Act No. 172, supra, that it was its intent and had been its intent that the State Department should have full and complete control of all duties incident to the payment of pensions to the persons entitled thereto under the Confederate Pension Law.

It is therefore my conclusion that, considering the Old Age Assistance Act as a whole and construing each of the provisions thereof so as to reconcile them with the other, the State Department of Public Welfare is authorized to make the investigation to determine if requirements of Section 3 of the Act have been complied with and, finding that such requirements have been met, may make the initial award and subsequent awards to Confederate pensioners on its own motion without the necessity of having the application filed with and passed upon by the County Board.

It may be said in passing that the foregoing conclusions in no sense of the word take away from the county its right to reduce or cancel the pension grant should, upon an investigation, the facts so warrant. This right is guaranteed to the County Department, subject to appeal and review as therein provided, by section 10 of the Act, which provides as follows:

"Section 10. If at any time the recipient of an old age pension, or the husband or wife of such recipient, shall become possessed of any property or income in excess of that owned or being received at the date of the application or if at any time any relative of the recipient responsible in law for his support, becomes able to support the recipient, in whole or in part, it shall be the duty of the recipient immediately to notify the County Department of the facts in the

case. The County Department upon such notification, or upon otherwise learning the facts, shall, after investigation, continue, reduce or cancel the amount of the pension as the facts may warrant. Its action in this respect shall be subject to appeal and review as provided in Sections 7 and 8 above."

Section 3 of the opinion rendered to you under date of March 18, 1936 (Quarterly Report of the Attorney General, Volume 2, page 308), conflicts in part with the foregoing conclusions, and insofar as the conclusions therein reached are contrary to those hereinabove determined upon, the said opinion is hereby overruled and withdrawn.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 21, 1938

Hon. Alex Brantley,
Judge of Probate,
Pike County,
Troy, Alabama.

Elections — Candidate entitled to have name placed on ballot where such candidate, within the time for qualifying, withdraws and requalifies, thus complying with the law in all respects, regardless of whether he had previously announced his candidacy and failed to comply with Section 588 of the Code of 1923.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of February 28, 1938, in which you request my opinion as follows:

"A candidate for a County office announced his candidacy, and six days later qualified with myself and the Chairman of the County Democratic Executive Committee. Realizing that he had waited one day longer than the law requires, he notified me and the County Chairman on February 26 in writing of his withdrawal and published a notice in a local paper that he had withdrawn.

"On February 28th, he filed his qualification papers with me, as Probate Judge, as a candidate for the same office, also with the Chairman of the County Committee and on February 28th, he had published in a local paper his announcement that he is a candidate for the same or original office. Under the above circumstances, will you please give me your official opinion on the following:

"1. In your opinion, is the candidate, in question, entitled to be placed on the ballot under the above conditions?

"2. Would I, as Judge of Probate, be liable in any way, Civil or Criminal, to place him on the Ballot under the above conditions?"

Answering your first inquiry, I advise you that, in my judgment, the said candidate is entitled to have his name placed on the ballot.

Section 588 of the Code of Alabama of 1923 provides, in part, as follows:

"Any candidate shall, within five days after the announcement of his candidacy for any office, if the office be a state office, file with the secretary of state, and if the office be a county office, file with the judge of probate of said county, and if it be a district or circuit office, file with the judge of probate of each county which is embraced in said district or circuit, the name of not less than one nor more than five persons elected to receive, expend, audit and disburse all moneys contributed, donated, subscribed or in any way furnish or raised for the purpose of aiding or promoting the nomination or election of such candidate, together with a written acceptance or consent of such person to act as such committee, but any candidate may, if he sees fit to do so, declare himself as the person chosen for such purpose.

* * *

Under the facts stated by you, the candidate in question filed his statement of the parties designated to receive, expend, audit and disburse contributions more than five days after insertion of political advertisement in a newspaper. However, it appears that the candidate has withdrawn his original qualification papers and within the time allowed by law requalified with the Chairman of the County Executive Committee and with the probate judge. The provisions of the corrupt practice law being penal in their nature must be strictly construed and may not be extended to cover situations beyond the precise scope covered by those sections of the law directly involved. **Doughty v. Bryant**, 226 Ala. 23, 25, 145 So. 420. Certain it is that only a very strained construction of Section 588 could prohibit a candidate, having once qualified for the office, from withdrawing his candidacy. It is entirely possible that a candidate for one office may decide to withdraw and requalify for another office. Or, a candidate having inadvertently failed to meet the qualifications or having violated one of the provisions of the corrupt practice act, and desiring to comply with such provisions, may withdraw and requalify. The law only applies to that candidate who has failed to file the statement required within five days after the announcement of his candidacy for office, as that term is used in the statute. The candidate mentioned in your inquiry even if he failed to comply with the law on his first attempt, appears to have now come within it in all respects and as such is properly entitled to have his name placed upon the ballot.

Inasmuch as my opinion upon your first inquiry is that the candidate has complied with all the requirements of the law and is entitled to have his name placed on the ballot, it necessarily follows that your second inquiry must be answered in the negative.

No opinion is expressed herein as to whether the five days period allowed by Section 588 of the Code begins running from the date upon which the candidate files his declaration with the party authority or from the date of publication of a newspaper in which he makes the first authorized announcement of his candidacy. An expression on that question is not necessary to this opinion.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 21, 1938

Hon. A. H. Collins,
State Superintendent of Education,
Montgomery, Alabama.

Officers—County Superintendent of Education of Walker County, whose term expires July 1, 1938, holds over until July 1, 1939, which is the beginning of the term of office of the superintendent elected under Act No. 88, H. 359, approved June 3, 1935, (Local Acts 1935, p. 23). The vacancy caused by the expiration of the term of office is not filled by Section 148 of the School Code of 1927, or Sections 2584 and 2585, Code of 1923, as said sections are applicable only to unexpired terms.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of your letter of February 10, 1938, which is as follows:

" I have a letter from Mr. James Nicol Jr., President of the Walker County Board of Education which reads as follows:

" 'In July 1933, the County Board of Education, Walker County, elected Mr. A. S. Scott, present county superintendent of education, for a term of four years, beginning July 1, 1934 and ending June 30, 1938.

" 'During the regular session of the legislature of 1935, a local act was passed and approved which provided for the election of the County Superintendent of Education of Walker County, Alabama by the qualified electors. This act provided the election for the year 1938 and sets the term of office for four years, beginning July next succeeding the election.

" ' July next succeeding the general election is July 1939. Therefore, there is a period of one year between the end of the present superintendent's term and the beginning of the term for the superintendent elected by the people.

" ' Does the County Board of Education of Walker County have the authority to appoint the County Superintendent?

" ' If so, shall the County Board appoint for a period of one year, or a minimum of two years?

" ' If the County Board of Education does not have the authority to appoint for the vacancy, how shall the appointment be made for the year beginning July 1, 1938 and ending June 30, 1939?"

"Will you please, at as early a date as possible, give me an opinion on the questions raised by Mr. Nicol?"

In answer to your inquiry, I am of the opinion that the County Superintendent of Education of Walker County, whose term of office expires on July 1, 1938, holds over until July 1, 1939, which is the beginning of the term of office of the superintendent elected under Act No. 88, H. 359, approved June 3, 1935, (Local Acts 1935, p. 23.).

The present Superintendent of Education of Walker County, according to the facts presented, was appointed County Superintendent of Education under the provisions of Section 138 of the School Code of 1927, for a term of four years beginning July 1, 1934, and ending June 30, 1938. The Local Act, above referred to, provides for the election of a county superintendent of education for the year 1938 and each four years thereafter for Walker County by the qualified voters of said County, and provides that his term of office shall be for four years from the first day of July succeeding the election and until his successor is elected and qualified. The term of office of the elected superintendent would, therefore, begin July 1, 1939. This leaves a lapse of one year from the time the incumbent superintendent's term expires until the time the newly elected superintendent assumes office. The question then presents itself as to the filling of the office during the interim. There is one of three possible solutions to the problem: (1) That the incumbent superintendent holds after the expiration of his term until July 1, 1939, when the newly elected superintendent's term begins (2) That the vacancy be filled under the provisions of Section 148 of the School Code of 1927, and (3) That the vacancy be filled under the provisions of Sections 2584 and 2585 of the Code of 1923.

Section 148 of the School Code of 1927, provides that the vacancy in the office of the county superintendent of education shall be filled by the county board of education in thirty days after such vacancy occurs. It further provides that in case the county board fails to fill the vacancy same may be done by the county superintendent of education. **The appointee under said section holds office for the unexpired term.**

Sections 2584 and 2585, Code of 1923, provide for the filling of the vacancy by the Governor when there is no other specific mode provided by law. **Both of the sections provide that the appointee holds for the unexpired term.** In construing Section 2584 of the Code, *supra*, our Supreme Court has held that said section had no application to a vacancy caused by the expiration of the term of office of an incumbent due to the fact that the appointee holds for the unexpired term as specifically provided in said section.—*Clark v. State*, 177 Ala. 188, 59 So. 259 and cases cited.

The same reasoning for holding that Section 2584 of the Code, *supra*, has no application to a vacancy caused by the expiration of the term of office of an incumbent is likewise applicable to Section 2585 of the Code, *supra*, and Section 184 of the School Code, *supra*.

It will be seen from the above that we have a situation wherein there is a vacancy in an office and no mode is provided for the filling of same.

In dealing with this proposition Mechem on Public Officers and Offices, p. 257, states the following rule:

"Section 397. HOW WHEN AUTHORIZED TO HOLD OVER.— It is usually provided by law that officers elected or appointed for a fixed term shall hold not only for that term but until their successors are elected and qualified. Where this provision is found, the office does not become vacant upon the expiration of the term if there is then no successor elected and qualified to assume it, but the present incumbent will hold until his successor is elected and qualified, even though it be beyond the term fixed by law.

"Where, however, no such provision is made the question of the right of the incumbent to hold over is not so clear, but the prevailing opinion in this country seems to be that, unless such holding over be expressly

or impliedly prohibited, the incumbent may continue to hold until some one else is elected and qualified to assume the office.

"Such a rule seems to be demanded by the most obvious requirements of public policy, for without it there must frequently be cases where, from a failure to elect or a refusal or neglect to qualify, the office would be vacant and the public service entirely suspended."

In accordance with the foregoing rule, I am of the opinion that the present incumbent whose term expires July 1, 1938, will hold over until July 1, 1939, when the term of the elected superintendent begins. There being no mode for filling the vacancy in question, the incumbent would of necessity hold over during the intervening period from the end of his term until the term of the elected superintendent begins.—*Stephens v. Davis*, 39 So. 831. As the law abhors vacancies in public offices, the office in question of necessity must be filled in some manner.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 26, 1938.

Hon. J. M. Hobbie,
Tax Collector,
Montgomery County
Montgomery, Alabama.
Taxation—Tax Collector.

1. Sale for delinquent taxes is to be made for the taxes remaining unpaid after deducting homestead exemption.
2. Credit for homestead exemptions should be given before the list of unpaid taxes is delivered to the Judge of Probate.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I am in receipt of your letter of March 7, 1938, wherein you request the following:

"Will you be kind enough to give me a prompt opinion on the following matter?

"Taxes on the property of Mr. A have not been paid, but Mr. A has claimed and received a homestead exemption certificate from the Tax Assessor. Should I, as Tax Collector, sell this property for the full amount of taxes due, or should I sell it for the amount of taxes less the amount of the homestead exemption certificate issued by the Tax Assessor?

"If I should sell it for the amount less the exemption certificate, how and when should I credit this exemption certificate? Should I give credit before reporting this list to the Judge of Probate in which he will issue a decree of sale?"

By Sections 47 and 55 of the Revenue Laws of 1935 (General Acts of 1935, p. 281 and 285) it is the duty of the tax assessor to enter in the as-

assessment book all assessments and all deductions from taxation by exemptions allowed to the tax payer, including therein homestead exemptions. Thereafter the State Tax Commission from this assessment book prepares a certificate (See Section 56 of Article I, General Acts of 1935, p. 286) showing the aggregate amount of taxes due on the property in the county and specifying the amount due to the state, county, special district tax etc. And this certificate should show the net taxes due the state after deducting the homestead exemption. This certificate pursuant to Section 56, supra, is the warrant to the tax collector to collect such taxes as shown by the assessment book.

So that under the procedure outlined above the tax collector has only to collect the taxes shown in the assessment book and a sale for delinquent taxes is only for those set forth in the assessment book, wherein the deduction for homestead exemption has already been allowed. (See Section 215 of the Revenue Laws of 1935, General Acts of 1935 at p. 351).

I conclude therefore that the sale of the property, as set forth in the facts you give me, should be for the amount of taxes unpaid less the homestead exemption certified by the tax assessor.

Section 215 of the Revenue Laws of 1935, supra, requires that the tax collector prepare a book, to be delivered to the Judge of Probate, describing the property on which taxes are unpaid, and further, stating the amount of taxes that are unpaid; specifying the amount due the state, county, etc. It is my opinion that the tax collector should credit the homestead exemption in this book prior to its delivery to the Judge of Probate. This book is to be prepared from the assessment book in which the tax assessor, as stated above, has already shown the homestead exemption.

Yours very truly,
A. A. CARMICHAEL.
Attorney General.

March 26, 1938.

Hon. Chas. W. Lee,
State Comptroller,
C A P I T O L .

Taxation—Assessment for ad valorem taxation of business in existence before October 1st of any year is based on average amount of goods, wares and merchandise on hand during preceding year or part thereof, but in no case less than capital actually employed. In case of new business, one commenced on or after October 1st of any year, the assessment for that year is based on capital actually employed on pro rata basis. "Capital employed" includes all assets of business without deducting liabilities.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of February 2, 1938, which is as follows:

"Please give me your opinion regarding the following questions:

"(1) If a party opens a business on or between October 1, and January 1, 1937, should he assess same for 60% of the amount of capital employed for taxes due October 1, 1938?

"(2) If a party opens a business on or between January 1, and March 31, 1938, should he assess same for three-fourths of 60% of the amount of capital employed for taxes due October 1, 1938?

"(3) If a party opens a business on or between April 1, and September 30, 1938, should he assess same for one-half of the amount of capital employed for taxes due October 1, 1938?

"(4) If a party opens a business after the Tax Assessor has closed his books should said assessment be treated as an escape?

"(5) If a party opens a business on any of the above mentioned dates should same be assessed on October 1, 1938 for taxes due October 1, 1939, on 60% of the average value of the stock on hand for the preceding year but in no case not less than 60% of the amount of capital actually employed?

"(6) In basing his assessment on the capital employed should he treat the stock of merchandise as capital and not offset any part of same with liabilities?

"(7) In using the capital employed as a basis of the amount of his assessment would not 'Capital Employed' be the entire amount set up on his books as assets of the business including cash?

"I wish to call your attention to Section 10 (d) of the Revenue Act of 1935, also opinion of the Attorney General April 20, 1927, page 161, Biennial Report 1926-1928; April 2, 1936, Vol. III, page 8; and section 10, (m) Revenue Act of 1935; Attorney General's opinion July 6, 1920, page 575, Biennial Report of 1918-20; case of State vs. Seals Piano Company, (1923) 209 Ala. 93, 95 So. 951, case State vs. Buchfield Brothers (1924) 211 Ala. 30, 99 So. 198, also Capital City Company vs. Montgomery, 117 Ala. 303, 23 So. 970."

Your inquiries involve a construction of Section 10 (d) of the Revenue Act of 1935, which is as follows:

"Section 10. The subjects of taxation, except as exempted by law, shall be as follows: * * * (d) All stocks of goods, wares and merchandise, the assessment to be on the average amount on hand during the preceding year, except in cases where business is commenced on or after October, 1st of a current year, and in such cases the assessment to be on the capital actually employed in the business and apportioned as herein-after provided, but the amount so assessed for any whole year shall in no case be less than the capital actually employed in the business, and this shall include all goods, wares and merchandise kept on plantations or elsewhere, or by railroad companies or persons, for sale or to be dealt out to laborers or employees for profit, or on account of their wages, and shall include all goods, wares and merchandise offered for sale by any person commencing business subsequent to the first day of October of a current year, but in such case the tax shall be apportioned according to the date at which the business was commenced, so that if commenced after the 1st day of January the tax shall be three-fourths (3/4) of the tax for the whole year; if commenced after the first day of April the tax shall be one-half (1/2) of the tax for the whole year; provided that the assessment herein provided for shall not include products raised on the farms in the hands of the original producers. If the person, association or corporation, receiver or trustee carrying on such business shall fail to make return of the amount of stock of goods, wares and merchandise as provided by law, or if the

county tax assessor is not satisfied with the return made, in order to make proper assessment, he shall have the right to demand a copy of the last inventory made of such stock of goods, wares or merchandise, and may also by inquiry of persons believed to have knowledge of the subject obtain information as to the probable average amount of such stock, and from such information may assess the same upon his best judgment." (*Italics supplied*).

Said subsection was a rewrite of subdivision (d) of Section 5 of the Revenue Act of 1919, which is as follows:

"Section 5. The subjects of taxation, except as exempted by existing laws, shall be as follows: * * *d. All stocks of goods, wares and merchandise, the assessment to be on the average amount on hand during the preceding year, but the amount so assessed shall in no case be less than the capital actually employed in the business, and this shall include all goods, wares and merchandise kept on plantations or elsewhere, or by railroad companies or manufacturing companies, or other associations, companies or persons, for sale or to be dealt out to laborers or employees for profit, or on account of their wages, and shall include all goods, wares and merchandise offered for sale by any person commencing business subsequently to the first day of October of a current year, but in such case the tax shall be apportioned according to the date at which the business was commenced, so that if commenced after the first day of January, the tax shall be three-fourths of the tax for the whole year; if commenced after the first day of April the tax shall be one-half of the tax for the whole year; provided that the assessment herein provided for shall not include products raised on the farms in the hands of the original producers. If the person, association or corporation carrying on such business shall fail to make return of the amount of stock as provided by law, or if the county tax assessor is not satisfied with the return made, in order to make proper assessment, he shall have the right to demand a copy of the last inventory made of such stock of goods, and may also by inquiry of persons believed to have knowledge of the subjects, obtain information as to the probable average amount of such stock, and from such information may assess the same upon his best judgment."

It will be noted that the 1935 Act materially changed the 1919 Act. The wording of both Acts is ambiguous and a careful analysis is necessary to arrive at the legislative intent.

In construing the 1919 Act this office held that no assessment of the stock of goods can be made in the tax assessment year in which the merchant goes into business.—**Biennial Report of Attorney General, 1926-1928**, p. 161. The changes in the 1935 rewrite of subsection (d) were evidently for the purpose of changing this ruling.

Under both Acts in cases of a business in existence a whole year preceding October 1st of any year, all stocks of goods, wares and merchandise are assessed on the average amount on hand during the preceding year, but in no case less than the capital actually employed in the business. The confusion arises in cases where a business is commenced on or after October 1st of any year.

In cases where the business is commenced on or after October 1st of any year, I am of the opinion that the assessment is made for that year on the capital employed. The second and third clauses of the 1935 Act provide "except in cases where business is commenced on or after October 1st of a current year, and in such cases the assessment to be on the capital

actually employed in the business and apportioned as hereinafter provided." (This portion was added in the 1935 Act). The manner hereinafter provided does not immediately follow the above quoted clauses but is several lines below and is as follows: "* * * but in such cases the tax shall be apportioned according to the date at which the business was commenced, so that if commenced after the 1st day of January the tax shall be three-fourths (3/4) of the tax for the whole year; if commenced after the first day of April the tax shall be one-half (1/2) of the tax for the whole year." This provision modifies the first quoted provision above although there may be intervening clauses. Such, in my judgment, is the legislative intent and the only logical construction of the ambiguous wording of the Act.

From the whole context of the 1935 Act, as rewritten in contrast with the 1919 Act, it follows that the Legislature intended that a business commenced on or after October 1st of any year should pay ad valorem taxes due that year in proportion to the time it commenced business, the tax being based on the capital actually employed in the business rather than the average amount of goods, wares and merchandise as in the case of an old business. In a new business there would be no average amount on hand during the preceding year. I do not think it was intended that a new business, one commencing on or after October 1st of any year, should wait until the following October to make its assessment, thus escaping ad valorem taxation for a portion of a year. This position is strengthened by subsection (m) of Section 10 of the 1935 Act, which is as follows:

"(m) All property brought into the State after the first day of October and before the Assessor has completed his assessment, shall be subject to taxation the same as if it had been held or owned in the State on the first day of October."

This shows the general intention to tax property brought into the State after October 1st of any year. The Legislature, in dealing with the specific subject of taxation of businesses, kept this general principal in mind and dealt with the matter in a more specific manner; viz., the proration method as above set out.

If a business is commenced after the tax assessor has closed his books the assessment may be treated as an escape. It is the duty of assessor to list such property for taxation when discovered although no penalty attaches. —Quarterly Report of Attorney General, Vol. III, p. 8.

The assessment of a business commenced on or after October 1st of any year for the October following should be on the average amount of goods, wares and merchandise on hand during the preceding year, but in no case less than the capital actually employed. The term "preceding year" as used in the 1935 Act does not, in my opinion, necessarily refer to a full or whole year.

From the foregoing, it follows your inquiries Nos. 1, 2, 3, 4 and 5 should be answered in the affirmative.

In my opinion your 6th and 7th inquiries should be answered in the affirmative. "Capital employed," in my opinion, includes the entire amount set up on his books as assets of the business including cash and same cannot be offset by any part of the liabilities. *Ellis v. Handley Manufacturing Co.* 214 Ala. 539, 108 So. 343.

The above conclusions are in accordance with the administrative construction placed on the Act under consideration by the State Tax Commission. Although an administrative construction is not controlling, it is

given great consideration in the construction of ambiguous statutes.— **Alabama Power Company v. Patterson**, 224 Ala. 3, 138 So. 421; **State v. Tuscaloosa Building and Loan Co.** 230 Ala. 99, 161 So. 530.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 26, 1938.

Hon. Henry S. Long, Chairman,
State Tax Commission,
C A P I T O L .

Estate and Inheritance Taxes—Interest payable on past due and delinquent tax from delinquent date to date of payment.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of your letter of March 4, 1938, which is as follows:

"Will you please advise with respect to our estate tax laws, whether or not the State should levy and collect interest on estate taxes due the State under the following conditions:

"1. An estate tax return is filed by representative of an estate and assessment of the tax as shown by the return to be due the State is made within the statutory time. No extension of time for payment of the tax is requested or granted. The tax is not paid for sometime after the statutory delinquent date. Should we collect interest on the past due and delinquent estate tax, from delinquent date to date of payment?

"2. An estate tax return is filed by representative of an estate, the tax is assessed as shown by the return to be due, the tax so assessed is paid before delinquent date, thereafter the return is audited by Federal Authorities, the value of property of the estate is increased either by Federal Authorities or agreement between representative of the estate and Federal Authorities, or by court decree, resulting in an additional or deficiency estate tax due the State. Should interest on the additional or deficiency tax be assessed and collected from original delinquent date of the tax assessed on the return as filed?

"Our estate tax statutes Article XII, Chapter 2, General Acts 1935, Page 434, approved July 10, 1935, provides in substance that copies of all estate tax returns made to the Federal Government should be made to the State Tax Commission of Alabama within twelve (12) months from date of death of decedent. The State Tax Commission is required to make assessment of the estate tax shown by the return as filed to be due the State of Alabama, the said assessment to be made in time for representative of an estate to file the State's receipt with Federal Authorities in order to get credit for the tax paid Alabama, when paying the Federal Government.

"At the time our statutes were enacted, the Federal Government required estate tax returns to be filed within twelve (12) months after

death of decedent, however, by Federal Acts approved August 31, 1935, the twelve months period was extended to fifteen (15) months, affecting estates of decedents dying after August 31, 1935.

"Our statutes requiring duplicates of returns made to Federal Authorities, we considered to be automatically extended from twelve months to fifteen months in which to file return, and pay the tax shown by the return to be due, inasmuch as a duplicate return could not be made when the original does not exist, and for the further reason that we can only levy an estate tax in an amount to absorb the credit permitted the states, under Federal rates of 1926.

"As further information, we wish to advise that the general procedure in filing estate tax returns both to Federal Authorities and the State of Alabama, is that the returns are generally filed just before the fifteen months expire, the returns are audited by Federal Authorities or agreement reached between them and representative of an estate, anywhere from three to eighteen months after the fifteen months have expired, and the audit or agreement generally results in additional or deficiency estate tax.

"We have heretofore in each case of delinquency, collected interest.

"We now have two estates owing us an additional or deficiency tax that are questioning the right of the State to levy and collect interest on these additional or deficiency taxes, and your opinion would be appreciated with respect to the questions above outlined."

I am of the opinion that your first inquiry should be answered in the affirmative.

Section 166 of the Revenue Act of 1935 provides as follows:

"Section 166. All taxes becoming delinquent, bear interest at the rate of six percent per annum; and such interest must be added to and collected as part of the taxes, and reported in such manner as the State Comptroller may prescribe."

Under this section all delinquent taxes now bear interest at 6% per annum. (See Opinion of Attorney General to Tax Collector, Washington County, February 25, 1938). In the case of estate and inheritance taxes, the State Tax Commission may grant an extension of time of payment not to exceed five years from original due date under either condition, but even in such case interest from original due date is collectible. (See Section 347.4 of Revenue Act of 1935).

I am also of the opinion that your second inquiry should be answered in the affirmative.

If payment is made on a tax return and it later appears that the return is not correct, resulting in a deficiency payment, the balance due, in my judgment, should be treated as a tax due but not paid. If payment of the balance due is not made on or before the due date, although the original payment was made on time, this balance is considered as delinquent and bears interest under Section 166 of the Revenue Act of 1935, *supra*. The filing of an inaccurate return is the fault of the taxpayer and not of the State.

It may be argued that in view of Section 347.14 of the Revenue Act of 1935, which deals with estate and inheritance taxes, the interest should

not attach under the facts presented in your second inquiry. Said section provides as follows:

"Section 347.14. Where appropriate returns are made and information supplied by the legal representative of any estate subject to the tax imposed hereby, the State Tax Commission shall make final assessment of the tax due in time to enable such legal representatives to make payment of the same and receive credit upon the federal tax. No interest or penalty shall accrue for any period prior to such final settlement. The State Tax Commission may adopt the valuation arrived at by the federal authorities, as the basis for the tax hereunder."

The final settlement referred to in this section, in my opinion, means the assessment made by the Tax Commission on which payment is made to the State, which amount is credited on the federal tax. Said section specifically provides that the assessment be made in time to enable payment of same and receive credit upon the federal tax. This assessment is based upon the return as made and is not audited by the State. If the Federal authorities, who audit the return, discover discrepancies, then the amount due is adjusted accordingly. If there has been an overpayment to the State, the taxpayer is entitled to a refund. On the other hand, if there has been an underpayment, there is a balance due. Since the final assessment, as referred to in the above quoted section, has been made by the Tax Commission, there is nothing to prevent interest accruing on this balance due if same is not paid before delinquency.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 26, 1938.

Mrs. Peter Preer,
Member, Board of Registrars,
Macon County,
Tuskegee, Alabama.

Elections—Residential requirements for registration—Persons who will have at the time of the next general election subsequent to the date of registration the residence qualifications required by Section 178 of the Constitution 1901, held qualified to register although such persons may not possess said residence qualifications at the time of registration.

Elections—**"Next general election"** as referred to in Section 181 of the Constitution held to mean general election for election of officers as distinguished from primary election held for the purpose of nominating candidates.

Opinion by Assistant Attorney General Small.

Dear Madam:

I have your letter of February 8, 1938, in which you request my opinion as follows:

"There has been quite a bit of discussion about a person being eligible for registration who has been in the state for more than two years, but in the county only, say, for six months. Of course, by the

next general election (in November) he would have been in the county for twelve months. Isn't it legal to allow him to register in the 10 day session in January? The application blank reads that way to me, but I would like very much to have your ruling on this point."

Under date of February 21, 1938, you further inquire as follows:

"I wrote you last week in regard to registering those who have not been in the County a year, but who will have been by the next general election, which means the Nov. Election. I would like to get this straight and a ruling from you, as there has been some discussion in regard to this. This clause applies to General election and not to Primaries as I understand it.—am I correct?"

In reply to your first letter I wish to refer you to Section 181 of the Constitution of Alabama which provides in part as follows:

"After the first day of January, nineteen hundred and three, the following persons, and no others, who, if their place of residence shall remain unchanged, will have, at the date of the next general election the qualifications as to residence prescribed in Section 178 of this article, shall be qualified to register as electors; provided, they shall not be disqualified under section 182 of this constitution." (Emphasis ours).

I wish to further refer you to Section 178 of the Constitution of Alabama which provides in part as follows:

"To entitle a person to vote at any election by the people, he shall have resided in the state at least two years, in the county one year, and in the precinct or ward three months, immediately preceding the election at which he offers to vote, and he shall have been duly registered as an elector, and shall have paid on or before the first day of February next preceding the date of the election at which he offers to vote, all poll taxes due from him. * * *"

You will note that the provisions of Section 181 of the Constitution quoted, supra, when considered and read with the provisions of Section 178 of the Constitution quoted, supra, unequivocally provide that a person desiring to register in the State of Alabama shall be entitled to register if at the time of the next general election, his residence remaining unchanged, said person shall have the residence requirements set out in Section 178 of the constitution, supra, namely; (1) He must have resided in the state at least two years. (2) He must have resided in the county at least one year. (3) He must have resided in the precinct or ward three months, all immediately preceding the election at which he offers to vote.

I wish to further call your attention to Section 381 of the Code of Alabama 1923 which sets out the qualifications for registration in Alabama as follows:

"The following persons and no others, who, if their places of residence shall remain unchanged will have, at the date of the next general election the qualifications as to residence prescribed by section 178 of the constitution of 1901, shall be qualified to register as electors provided they shall not be disqualified under the laws of the state; (Emphasis ours).

"1st. Those who can read and write any article of the constitution of the United States in the English language, and those who are physically unable to work; and those who can read and write any article of the constitution of the United States in the English language and who have

worked or been regularly employed in some lawful employment, business or occupation, trade or calling for the greater part of twelve months next preceding the time they offer to register, and those who are unable to read and write, if such inability is due solely to physical disability; or

"2nd. The owner in good faith in his or her own right, or the husband of a woman or the wife of any man who is the owner in good faith in her or his own right of forty acres of land situated in this state, upon which they reside; or the owner in good faith in his or her own right; or the husband of any woman or the wife of any man who is the owner in good faith in his or her own right of real estate situated in this state, assessed for taxation at the value of three hundred dollars, or more; or the owner in good faith, in his or her own right, or the husband of any woman or the wife of any man who is the owner in good faith in her or his own right, of personal property in this state assessed for taxation for three hundred dollars or more; provided that the taxes are due upon the real or personal property for the next year preceding the year in which he or she offers to register shall have been paid, unless the assessment shall have been legally contested and is undetermined."

The question of residence requirements for registration for voting in Alabama has caused no little confusion for a considerable length of time. I have therefore felt it proper to set out in detail the above quoted provisions of the law and to further call your attention to opinions of the Attorney General directed to the question contained in the instant inquiry. The following opinions of the Attorney General are in accord, and consistent with the holding announced in the instant opinion and are therefore referred to with approval:

1. An opinion addressed to Honorable Thomas R. Ferris, County Board of Registrars, Montgomery County, under date of December 10, 1931, reported in Office Edition, Vol. 7, p. 168, holds that a person offering to register who will have acquired residence in the county at the time of the next general election shall be permitted to register.

2. An opinion addressed to Miss Bernice F. Crumpton, Clerk of the County Board of Registrars, Ashland, Alabama, Clay County, under date of February 16, 1932, holds that if a person will have at the date of the next general election the requirements of residence in Alabama, said person shall be given the right to register.

3. An opinion addressed to Hon. L. H. Clark, Chairman, County Board of Registrars, Florence, Alabama, reported in Office Edition, Vol. 8, p. 273, holds that, "A person does not have to live in a county twelve months in order to register, * * *."

4. An opinion written to Hon. J. A. Williams, under date of January 11, 1932, Circuit Clerk of Chambers County, LaFayette, Alabama, reported in Office Edition, Vol. 8, p. 97, quoted the opinion addressed to Hon. Thomas R. Ferris cited, supra. I do not therefore quote the holding of this opinion here.

5. An opinion addressed to Hon. W. O. Crowley, Chairman of the Board of Registrars, Geraldine, DeKalb County, Alabama, under date of February 25, 1932, deals with the question of how one may acquire residence in the state for voting purposes.

6. An opinion addressed to Hon. Wm. W. Hill, Judge of Probate, Montgomery County, Alabama, under date of September 12, 1935, and reported

in Vol. 6-A, Office Edition, sets out age and residential requirements for registration.

7. An opinion addressed to Mrs. Jessie W. Nunnellee, Chairman Board of Registrars, Montgomery County, Alabama, under date of January 6, 1936, reported in the Quarterly Report of Attorney General, Vol. II, p. 5, ask the following question, "It it not the law that those who have been in the county two years prior to the next general election are entitled to register?" This question is answered in the affirmative.

8. An opinion addressed to Hon. Chas. E. McCall, State Auditor, reported in the Quarterly Report of the Attorney General, Vol. II, p. 76, further points out the above named requirements for registration of voters in Alabama.

In my judgment all of the above cited opinions state true and correct propositions of law in so far as the registration of voters is concerned, and are in agreement with the holding here announced on this particular question.

I wish to further call your attention to the following opinions which not only are not in agreement with the holding here announced but in my judgment do not state correct propositions of law and are hereby expressly overruled.

1. Opinions reported as follows; Biennial Report 1928-30, p. 694, addressed to Hon. J. B. Dykes, under date of December 6, 1929; Biennial Report 1926-28, p. 337, addressed to Hon. C. F. Winkler, Judge of Probate, Greenville, Alabama, under date of October 26, 1927; opinion addressed to Mrs. M. D. Holman, Chairman of Board of Registrars, Sumter County, Livingston, Alabama, under date of December 16, 1935. All of these conflicting opinions are set out in the opinion addressed to Hon. Chas. E. McCall cited, supra, where the same are expressly overruled.

I also call your attention to an opinion addressed to Hon. J. H. Holland, Board of Registrars, Winston County, Haleyville, Alabama, under date of January 29, 1936, reported in the Quarterly Report of the Attorney General, Vol. II, p. 73, which is in accord with the holding announced in the instant opinion and is here referred to with approval, and refer you to the case of *Shepherd v. Sartain*, 64 So. 57, wherein the ruling of the Supreme Court on related questions are not inconsistent with the holding announced herein.

In reply to your second question, I wish to advise that in my opinion the words "Next general election" as used in Section 181 of the constitution refer to the general election held in November and not to the primaries held in May and June. I refer you to an opinion of the Attorney General, reported in Biennial Report 1928-30, p. 719, addressed to Hon. Chas. E. McCall, wherein a very clear distinction is drawn between a primary election and a general election. I call your particular attention to the definition of "Primary Election" in said opinion which is as follows:

"A 'primary election' denotes an election held by a Political Party for the purpose of selecting candidates for public office."

I further call your attention to Section 601 of the Code of 1923 which defines primary election: "Primary Election within the meaning of this chapter is an election held by the qualified voters who are members of any political party for the purpose of nominating a candidate or candidates for public or party office."

From the above definitions you will note that primary elections are confined to the selection of candidates from a political party and that it is quite a different thing from a general election which is held for the purpose of filling public office by the election of candidates for said office.

It is therefore my opinion that the clause "Who * * * will have, at the date of the next general election, the qualifications as to residence prescribed in section 178 of this article, shall be qualified to register as electors, * * *", means the general election held in November for election of officers as distinguished from the primary election or elections held for the purpose of nominating candidates.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 26, 1938.

Hon. Hunter Phillips,
Tax Assessor of Choctaw County,
Butler, Alabama.

Under Homestead Exemption Act (General Acts 1936-37, page 113) owner of adjoining tract of land or an interest therein is entitled to include said tract in Homestead Exemption where said other tract is bona fide and habitually used as a part of said homestead.

Where tract does not adjoin homestead, is leased, and total of the two tracts exceed statutory area, said tract cannot be included as part of homestead.

Opinion by Assistant Attorney General Thomas.

Dear Sir:

I am in receipt of your letter of September 21st stating:

"Mr. B. J. Ezell owns a home in the small town of Lisman, Alabama, valued at \$400.00, on which he is entitled to the homestead exemption credit. In addition to his home he owns an undivided one eighth interest in his father's estate which consists of 566 vacant lots in the town of Lisman, and which is assessed in the name of the heirs, on a separate assessment from that of Mr. Ezell. There is a part of this undivided property that adjoins the home place of Mr. Ezell, on which he has about 10 acres in cultivation. Please advise me if Mr. Ezell will be entitled to the exemption on the estate property.

"I have also two ladies who live on a tract of 55½ acres, and have another tract about two miles north of the home place on which their farm is located. The farm is rented and the rent received from this farm of 285 acres is their sole source of income. Will these ladies be entitled to claim enough of this acreage to make out the total of 160 acres?"

I am of the opinion that Mr. Ezell is entitled to include his one eighth interest in the 10 acres of estate property which he has under cultivation if said cultivation is in connection with his use of his homestead as such, subject to restriction that total sum of \$2,000.00 only can be claimed by all parties together in total tract owned together. As to the balance of the estate property he is not entitled to include his interest therein in his claim

for homestead exemption. The Homestead Exemption Act reads as follows (1936-37 General Acts page 113):

"Section 1. The word 'homestead' as herein used is the 'homestead' as now defined by the Constitution and Laws of the State of Alabama.

Section 2. Homesteads, as herein defined, are hereby exempted from all State ad valorem taxes beginning October 1, 1937.

Section 3. In no case shall the exemption herein made apply to more than one person, head of the family, nor shall said exemption exceed Two Thousand Dollars (\$2,000.00) in assessed value nor one hundred sixty (160) acres in area."

Section 205 of the Constitution of Alabama provided that "any lot in a city, town or village, with the dwelling and appurtenances thereon owned and occupied by any resident of this State, and not exceeding the value of \$2,000.00, is exempted as a homestead."

This provision of the Constitution as to homesteads has been construed in the case of *Emrich v. Gilbert Manufacturing Company*, 35 So. 322, 138 Ala. 316, which holds that where one owns an undivided interest in a lot, and uses and occupies it in connection with the lot on which the main part of his residence is situated, such interest, together with the lot, not exceeding \$2,000.00 in value, is subject to homestead exemption.

The case of *Tyler v. Jewett*, 2 So. 905, 82 Ala. 93, states that under the Constitutional and Statutory provisions exempting any lot in a city or town as a homestead, two or more adjoining lots, may be claimed as a homestead if occupied as such. The facts in the *Emrich v. Gilbert Manufacturing Company* case are practically identical with the *Ezell* situation, and under that and the *Tyler v. Jewett* case, I am of the opinion that Mr. *Ezell* can claim his undivided one eighth interest in the 10 acres directly adjoining his homestead if used as above stated.

As to whether the two ladies you mentioned are entitled to homestead exemption of the 285 acre tract, the Supreme Court in a similar statement of facts in the case of *Turner v. Turner*, 107 Ala. 465, held that such tract was not part of the homestead. The court, after mentioning certain cases states (1-107 Ala. at page 469):

"These cases hold that a disconnected tract not contiguous to the tract upon which the dwelling is situated, but bona fide and habitually used as a part of it, may, by such use, become impressed with the homestead character, notwithstanding its remoteness or separation from the mansion house, but 'this ruling has not been extended further than to embrace two parcels, already used and appropriated to homestead purposes where they together do not exceed the statutory area and valuation.' *Jaffrey v. McGough*, supra."

It therefore appears that the ladies would not be entitled to exemption because the two disconnected tracts exceed the statutory homestead area.

As to your statement that the rent received from the separate tract is the sole source of income of the ladies, the court in the case of *Turner v. Turner*, supra, made the following statement:

"It is argued by appellant's counsel that the use of the rents, from the hotel for the support of the decedent's family, constituted such a connected use of the disconnected property, as to impress the latter with

the homestead character. It was expressly decided in **Kaster v. McWilliams**, 41 Ala. 302, that while the renting of land may be a source of profit which contributes to the support of the family, yet that is not the sort of use intended; the statute contemplating the use of the thing not of its profits or of an income derived from it. That case has been repeatedly cited and its principle reaffirmed in our subsequent decisions, (**Murphy v. Hunt**, 75 Ala. 438; **Lehman v. Bryan**, 67 Ala. 558; **McConaughy v. Baxter**, 55 Ala. 379), and is conclusive against the correctness of appellant's contention."

See also **Dexter v. Strobach**, 56 Ala. 233.

I am therefore of the opinion that the ladies in this case are not entitled to homestead exemption out of the 285 acre tract.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 26, 1938.

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

(1) Act of 1900-1901, p. 2024, (fixing ex officio fees of several officers in several counties) repealed by Section 3715 of Code of Alabama, 1907.

(2) Officers who received ex officio fees pursuant to terms of repealed Act, supra, liable therefor, Section 2619 of Code of Alabama, 1923, affording no protection in such a case.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of December 17, 1937, in which you request my opinion as follows:

"Please refer to Acts 1900-1901, page 2024, case of **Isbell vs. Shelby County**, 10 Ala. App. 639, and Sections 7285, 7278-7282 Inc., and 7287, Code of 1923 and advise me as follows:

"1. Has the Act of 1900-1901 been repealed in so far as it relates to the Ex-Officio fees of various Judges of Probate by the adoption of the Constitution of 1901 or any subsequent legislation? Reference also, your opinion to Hon. W. E. Butler, Judge of Probate, Madison County, under date of December 4, 1935, Volume No. 1, page 302.

"2. Has the Act of 1900-1901 been repealed in so far as it relates to the Ex-Officio fees of various Clerks by the adoption of the Constitution of 1901 or any subsequent legislation?

"3. Has the Act of 1900-1901 been repealed in so far as it relates to the Ex-Officio fees of various Sheriffs by the adoption of the Constitution of 1901 or any subsequent legislation?

"4. In the event the Act of 1900-1901 has been repealed, would the officer and his official bond be protected for any amount drawn in excess

of the amount allowed such officer under the General Law by Section 2619, Code of 1923?

"5. In the event the Act of 1900-1901 has not been repealed, as it relates to the above mentioned officers, would the officer and his official bond be protected for any amount drawn in excess of the amount allowed such officer under the General law by Section 2619, Code of 1923.?"

The Act of 1900-1901 was in fact a Local Act which applied only to certain counties of the State. I call your attention to Section 3715, Code of Alabama, 1907. An inspection of this section makes it manifest that it was the general intention of the Legislature, by the enactment of this section, to establish a uniform system of ex officio fees for sheriffs, clerks, etc., throughout the State, and that all laws, both local and general, inconsistent with it are intended to be repealed. — 36 Cyc. 1090-1091. We recognize the fact that repeal by implication is not favored, yet, when the two laws or acts are in conflict, or the second revises the whole subject matter of the former or is intended to set up a new system, the former is repealed. — *Gibson v. Mabry*, 145 Ala. 112.

We also call attention to the case of *Isbell v. Shelby County*, 10 Ala. App. 639. Therefore, my answer to your requests Nos. 1, 2 and 3 is in the affirmative.

Answering your fourth request, my answer is in the negative. If the Act of 1900-1901 is repealed by Section 3715, Code of Alabama, 1907, it could offer no protection to any officer who went contrary to the provisions of said section. The section to which you refer, namely, Section 2619, Code of Alabama, 1923, deals with void statutes, and has no bearing on the matter here involved. We are dealing here with a repealed Act, and certainly an officer paying out money or receiving money under a repealed Act is acting without authority of law.

Having answered you as I have above, this eliminates your fifth question.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 26, 1938.

Hon. J. T. Albritton,
Superintendent of Education,
Geneva, County,
Geneva, Alabama.

Contracts—County Board of Education not authorized to pay contractor an amount deducted by Federal Government for breach of condition on W. P. A. contract where County Board of Education pays 55% of contract price and the Federal Emergency Administration of Public Works pays 45%.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of March 11, 1938, which is as follows:

"On the 30th day of October, 1935 the County School Board of Geneva County of Geneva, Alabama joined by the Federal Emergency Administration of Public Works entered into a Contract with C. C. Smith to complete the City School Building at Hartford in Geneva County. I am enclosing herewith this contract. Under the terms of this contract the School Board of Geneva County was to pay 55% of the Contract price and the Federal Emergency Administration Work was to pay 45%. On page thirteen (13) of said contract the Contractor agreed to keep a competent and active watchman on the operation after the regular working hours, at all times during the progress of the work.

"Mr. Smith failed to carry out this part of the contract in that he did not keep a watchman on this job. The Federal Government deducted three hundred seventy-nine dollars and fifty cents (\$379.50) as its pro rata part of the contract to take care of a watchman. Will you please give me your opinion stating whether or not the Geneva County School Board should pay to Mr. Smith or would have authority to pay to Mr. Smith out of the school funds this three hundred seventy-nine dollars and fifty cents (\$379.50) which would have been paid to him by the Works Progress Administration had Mr. Smith carried out this part of the contract?"

I am of the opinion that your inquiry should be answered in the negative.

As stated in your letter, the County Board of Education of Geneva County was to pay 55% of the contract price and the Federal Emergency Administration of Public Works to pay 45%. When the County Board of Education has paid the 55%, it has fulfilled its part of the contract. Therefore, there is no authority for the county to supplement and deductions made by the Federal Government for breach of conditions of the contract by the contractor.

I am herewith returning file in this matter.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 26, 1938.

Hon. L. W. Price,
Judge of Probate, Conecuh County,
Evergreen, Alabama.

County Surveyor. Act of Extra Session of 1933, page 203—Bond of County Surveyor set in the penalty of \$1,000 and must be approved by the governing body of the County.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of January 7th in which you request my opinion as follows:

"Will you please refer to House Bill 183, page 557 of General Acts of Legislature of 1931, Regular Session also to House Hill 344, page 203, Extra session of Legislature of 1933, also to any such acts in connection with the setting and approving of official bonds, and advise

me who should fix the amount of approving the bonds of County Surveyor."

Your first question is as to who should fix the amount of the bond of County Surveyor. Before 1931, the bond of the County Surveyor was regulated by Section 10347 of the Code of 1923, which provided that such County Surveyor should give bond in the penalty of \$1,000, to be approved by the Judge of Probate. The Act of 1931, P. 557, did not, in my opinion change this requirement. That statute only vested the Boards of Revenue or other county governing bodies with the authority to fix the amount of the official bond, where such official bond was at that time required by law to be fixed by any other authority. By the Act of the Extra Session of 1933 (Acts of 1933, pg. 203), complete new system of regulating the amounts of and approving officials' bonds was enacted. I have recently considered the effect of this statute upon bonds given by commercial notaries public and nothing in this opinion is to be taken as limiting or changing that opinion. Opinion to Board of Revenue of Barbour County, January 14, 1938.

As to the county officers named in the Act of 1933, it is my opinion that this act repeals all contrary statutes and completely supersedes the pre-existing statutory regulations. Under Section 14 of the Act of 1933, the bond of a County Surveyor is set at \$1,000. Under Section 3 thereof the court of county commissioners, Board of Revenue, or other like governing body of the County is authorized to approve the official bond of the County Surveyor.

I trust this completely answers your question.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 26, 1938.

Hon. C. M. A. Rogers,
Senator, 33rd District,
Mobile County,
Mobile, Alabama.

License—Act No. 58, General Acts 1932, p. 68.

"Trailer", as defined by Act No. 58, supra, operated exclusively within the corporate limits and the police jurisdiction of a municipality, is not subject to license tax imposed for the use of the State of Alabama.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I quote your letter as follows:

"As I read the law regulating and limiting the use of motor trucks, semi-trailer trucks, semi-trailers, and trailers in the General Acts of Alabama, Extra Session, 1932, page 68, it would appear that a four wheel trailer is exempt from payment of any State license. Under Section 10 on page 70 of the General Acts of Alabama of 1932, it is provided: 'If any motor truck, semi-trailer truck or trailer shall be licensed by any

City or incorporated town in this State and the registration plate or plates issued as evidence of said license shall be conspicuously exhibited on said motor truck, semi-trailer truck or trailer in the manner required by ordinance, the provisions of Sections 3, 4, 5, 6 and 7 hereof shall not apply to the operation of such motor truck, semi-trailer truck or trailer within the limits of the City or incorporated town issuing said license or within the police jurisdiction thereof.'

"The City of Mobile by ordinance provided that the streets may be used for trailers provided no such trailer including its load shall exceed in weight 20,000 lb., in height 12', in width 96" or in length, 30'.

"The question which I wish to propound to you for your decision is whether anyone having paid a license required by the City ordinance is subject to the payment of a State and County license.

"It occurs to me that the trailer which is legally operated in the City of Mobile by reason of the examination in the General Acts of Alabama, just quoted, and by reason also of the ordinance of the City of Mobile, is not subject to the payment of a State license. The theory of these licenses, as I understand it, is that persons who pay licenses, pay them because of benefits received from the licensing authorities. Where the use of streets is limited to the streets of the municipality, it occurs to me that the payment of the municipal license which is employed for the maintenance of the streets and the police authorities is the sole license which should be exacted under our present laws of any person operating one of these four wheel trailers.

"I have discussed this matter with Judge Tisdale Touart of the Inferior Civil Court of Mobile, and I am sending him a copy of this letter, Insofar as he and I are advised, no ruling has been made by the Attorney General or by any court of controlling jurisdiction."

I quote the pertinent provisions of Act No. 58, General Acts 1932, p. 68, as follows:

"DEFINITIONS Section 2. * * * 'Trailer' means any vehicle designated to be drawn by a motor-truck or truck-tractor, but supported wholly upon its own wheels, and intended for the carriage of freight or merchandise and with a load capacity of over 1,000 pounds. * * * 'Highway' shall include any public road, street, avenue, alley or boulevard, bridge, viaduct, or trestle and the approaches thereto, within the limits of the State of Alabama. * * *

"TRAILERS Section 3. No person shall operate any trailer on any highway.

"EXEMPTIONS Section 10. * * * (b) If any motor-truck, semi-trailer truck or trailer, shall be licensed by any city or incorporated town in this state, and the registration plate or plates issued as evidence of said license shall be conspicuously exhibited on said motor truck, semi-trailer truck or trailer in the manner required by ordinance, the provisions of Sections 3, 4, 5, 6 and 7 hereof shall not apply to the operation of such motor-truck, semi-trailer truck or trailer, within the limits of the city or incorporated town issuing such license, or within the police jurisdiction thereof. Provided, that all cities and incorporated towns are hereby empowered to provide, by ordinance, maximum limits with respect to the weight, height, width and length of motor-trucks, semi-trailer trucks and trailers within their respective boundaries, not less, however, than the maximum limits prescribed in

Sections 4, 5, 6 and 7 hereof, to authorize the operation of trailers, therein, to impose license taxes on motor-trucks, truck tractors, semi-trailers and trailers, and to require that all vehicles to which licenses may be issued shall affix the registration plate or plates issued as evidence of said licenses to said vehicles in some conspicuous place, to be prescribed by ordinance. * * *

The latter section authorizes the operation of a "trailer" within the corporate limits and police jurisdiction of a municipality, and, therefore, is an exception to Section 3 aforequoted. This latter section also authorizes the municipality to impose a license tax for the operation of such "trailer." It is to be noted that such authorization for operation of a "trailer" does not extend beyond the corporate limits and the police jurisdiction of the municipality.

The State of Alabama has not prescribed or fixed any State license tax for the operation of a "trailer" within the exempted area or elsewhere. Schedule 158.11, Article XIII, Chapter 6, General Acts 1935, p. 256, provides a license tax in favor of the State for the operation of a small trailer or a semi-trailer on the highways of the State, but nothing is said about a trailer. "Semi-trailer", as defined in said Article XIII, supra, does not embrace "trailer" as defined in Act No. 58, supra.

I, therefore, conclude that the "trailer" may be operated within the exempted area without the payment of a license tax to the State of Alabama.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 26, 1938.

Hon. Festus M. Shamblin,
Sheriff, Tuscaloosa County,
Tuscaloosa, Alabama.

Tuscaloosa County—
Employees of Sheriff's Office—

Under Local Acts, 1936, page 54, the Sheriff of Tuscaloosa County, with the approval of the County Governing Body, may employ additional deputies and employees of the sheriff's office; and the compensation of such additional employees shall be fixed by the County Governing Body and paid from the county treasury.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"The extra session of 1936 Legislature passed a bill placing the sheriff of Tuscaloosa County on a salary, (Acts, Extra Session, 1936, p. 53). Since that time the office has grown, the detail work increased, and it very necessary for the efficient operation of the Sheriff's office of Tuscaloosa County to hire a bookkeeper and stenographer. Under this Act, can she be paid out of the county treasury?

"I also have some deputies who are not on regular salaries out in the rural districts. They have performed some very fine work for which I think they are entitled to pay. Can they be paid a reasonable sum for services rendered if agreed upon by the Sheriff and the Board of Revenue?"

In my opinion, your first inquiry must be answered in the affirmative.

Section 3 of the Local Act referred to in your request provides:

"Section 3. That the number and compensation of the deputies of the sheriff of Tuscaloosa County, Alabama, guards, jailers, and any other employees of the sheriff, shall be fixed by the Board of Revenue of Tuscaloosa County, Alabama; provided however, that the minimum number of deputy sheriffs shall not be less than four and their salary shall not be fixed at less than Fifteen Hundred and no/100 (\$1500.00) Dollars per annum, each, and that there shall be a chief deputy sheriff, whose salary shall not be less than Fifteen Hundred and no/100 (\$1500.00) Dollars per annum, and there shall be one jailer, whose salary shall not be less than Twelve Hundred and no/100 (\$1200.00) Dollars per annum; provided further, however, that the Sheriff shall have the exclusive right to select and discharge the said chief deputy, deputies, guards, jailers and other such employees, and that they shall be under his control and direction; that this section shall not affect the powers and duties of the sheriff under Section 5135 of the Code of Alabama, 1923; that in addition to the above mentioned deputies, guards, jailer and other employees, the Board of Revenue shall have the right from time to time to increase the number of such deputies, guards, jailers and other such employees, and to fix their compensation, and from time to time to abolish such additional deputies, guards, jailers and other such employees, and the sheriff shall have the exclusive right to select and discharge, control and direct the same. The salary or compensation of such chief deputy sheriff, deputy sheriffs, guards, jailers, and other such employees, shall be paid out of the County Treasury of Tuscaloosa County, in equal monthly installments at the end of each month upon warrant drawn in the same manner as other employees of Tuscaloosa County are paid."

In my opinion this Act affords ample authority for the employment of such additional employees as may be approved by the County Governing Body; and their compensation may be paid out of the county treasury. Of course, the approval of the employment of such employees, and provision for the payment of their compensation out of the county treasury, is in the sound discretion of the county governing body.

Your second inquiry is answered by the provisions of Section 3, quoted, *supra*.

If the County Governing Body approves and authorizes the employment of deputies sheriff, their compensation may be paid out of the county treasury.

The statute does not undertake to authorize the sheriff to employ such deputies as he deems proper; but, if the employment of such deputies is approved by the County Governing Body, their compensation in such amount as may be fixed by the County Governing Body, properly may be paid from the county treasury.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 26, 1938.

Hon. Hamp Draper,
Associate Member,
Board of Administration,
Capitol.

Whenever a convict is sentenced to the penitentiary and under Section 3242 of the Code of 1923 elects to serve pending appeal and the case is reversed, the convict cannot claim the benefits under Section 3650 of the Code of Alabama 1923 as to money, transportation and clothes.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of December 17, 1937, in which you request my opinion as follows:

"Will you please advise if a prisoner who has been convicted in the lower court and who has appealed to the higher court who elects to serve in the penitentiary pending outcome of his appeal and whose case is reversed and remanded on appeal, is entitled to the ten dollars (\$10.00) and other benefits provided for in section No. 3650 of the code when he is dismissed from the penitentiary after his case is reversed and remanded."

Whenever a convict begins serving his sentence pending appeal, he does this voluntarily and not by force of law.

I call your attention to Section 3242, Code of Alabama 1923, which is as follows:

"Waiver of benefit of suspended sentence.—In all cases where there is judgment suspending sentence, at any time before the transcript has been forwarded to the clerk of the appellate court, the defendant in person, or by his attorney, may waive the benefit of the suspended sentence by filing in the office of the clerk of the court in which the case was tried, a statement in writing to that effect, signed by himself or his attorney of record, and the clerk must then enter the fact and date of such waiver of suspension of sentence upon the margin of the record of the judgment and shall report said convict to the president of the state board of administration or to the convict department, as in cases where there is no judgment or suspension of sentence; but such waiver of suspension shall not affect the appeal."

I also call your attention to Section 3650, Code of Alabama 1923, which is as follows:

"Convict provided with clothing and money when discharged.—Each convict, at the expiration of his term of confinement, must be discharged from the penitentiary, and must be furnished with a decent suit of clothes and money sufficient to enable him to reach his destination, not exceeding ten dollars; but if any convict is sick at the time his term expires, he must not be discharged except at his own request. If such convict is charged with the commission of any other criminal offense, he must be delivered to the proper sheriff or officer to answer such charge, under such rules and regulations as may be prescribed by the board."

You will note the latter section says: "Each convict, at the expiration of his term of confinement, * * *" shall be furnished money and clothes, etc.

If the defendant elects to serve during his appeal and the case is reversed by the higher court, this cannot be said to be the expiration of his term. Of course, it may be or it may not be, depending wholly on what happens on retrial of the case in the lower court. Therefore, I do not believe this statute applies to convicts of this class.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 26, 1938.

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Franchise Tax—Application by Building and Loan Association
for refund of franchise tax is barred after one year.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your communication of February 15, 1938, as follows:

"Is there any authority of law by which Franchise Taxes paid under protest in 1933 by the Guaranty Savings Building & Loan Association for the following years be refunded?

"Year	State Tax Com. No.	Amount
1928	85309	\$ 98.99
1929	95465	198.36
1930	5154	255.17
1932	A4012	278.75
		\$831.27

"I wish to call your attention to Amendment 27 to the State Constitution which was adopted by general vote of the people in the year 1935, see page 1153 of General Acts of Alabama 1935. This Amendment exempted Building and Loan Associations from Franchise Taxes on withdrawal shares and they are now asking for a refund of the amount paid in the above mentioned years."

I am of the opinion that the Guaranty Savings Building and Loan Association is not entitled to have the taxes refunded for the years above set forth. These taxes were paid under a valid provision of the law and the fact that this and similar corporations were exempted by Amendment 27 of the Constitution does not affect their position. This Amendment did not become effective until 1935 and any exemption which this corporation might claim can exist only from that date.

Further you state that the taxes were paid in March, 1933. By General Acts of Alabama, 1931 No. 432, Section 2, at page 528, it is provided that an application for a refund for taxes paid directly to the State Tax Commission

must be made "within twelve months from the date of such payment," so that in this case the application for a refund has been made more than twelve months after payment of the tax itself. The Guaranty Savings Building & Loan Association is now barred by law from securing refund.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 26, 1938.

Board of Revenue,
Macon County,
Tuskegee, Alabama.

Counties—May issue interest bearing warrants against gasoline fund. Cannot issue bonds or warrants against general fund without an election except for specific purposes set forth in County Financial Control Act. (General Acts 1935, p. 803).

Opinion by Assistant Attorney General Screws.

Gentlemen:

This is to acknowledge receipt of your letters of February 8, 1938 and February 12, 1938, in which the following inquiry is presented:

"The Board of Revenue is desirous of borrowing \$15,000.00 for the purpose of building roads, payable within 10 years.

"We have a margin of borrowing power of \$15,000.00 under the Constitution.

"Can the Board of Revenue issue warrants or Bonds for that purpose without holding an election for the same."

A definite answer to your inquiry depends on the fund against which the warrants or bonds will be issued.

If the warrants in question are to be issued against the gasoline fund, your inquiry is answerable in the affirmative. Interest bearing warrants may be issued by counties against the gasoline fund without an election.—**Quarterly Report of Attorney General, Vol. 5, pp. 32 and 38; Herbert v. Perry, (Ala. Sup. Ct.) 177 So. 561.** I am enclosing copy of the Supreme Court opinion for your information.

On the other hand, if the warrants or bonds are to be issued against the general fund of the county as general obligations of the county, your inquiry must be answered in the negative. In such a case an election will be necessary.

Section 222 of the Constitution of Alabama, 1901 reads as follows:

"The legislature, after the ratification of this constitution, shall have authority to pass general laws authorizing the counties, cities, towns, villages, districts, or other political subdivisions of counties to issue bonds, but no bonds shall be issued under authority of a general law unless such issue of bonds be first authorized by a majority vote by ballot of the qualified voters of such county, city, town, village, district, or other political subdivision of a county, voting upon such proposition. The

ballot used at such election shall contain the words: 'For * * * bond issue. 'and 'Against * * * bond issue' (the character of the bond to be shown in the blank space), and the voter shall indicate his choice by placing a cross mark before or after the one or the other. This section shall not apply to the renewal, refunding, or issue of bonds lawfully issued, nor to the issuance of bonds in cases where the same have been authorized by laws enacted prior to the ratification of this constitution, nor shall this section apply to obligations incurred or bonds to be issued to procure means to pay for street and sidewalk improvements or sanitary or storm water sewers, the cost of which is to be assessed, in whole or in part, against the property abutting said improvements or drained by such sanitary or storm water sewers."

While Section 224 thereof provides:

"No county shall become indebted in an amount including present indebtedness, greater than three and one-half per centum of the assessed value of the property therein; provided, this limitation shall not affect any existing indebtedness in excess of such three and one-half per centum, which has already been created or authorized by existing law to be created; provided, that any county which has already incurred a debt exceeding three and one-half per centum of the assessed value of the property therein shall be authorized to incur an indebtedness of one and a half per centum of the assessed value of such property in addition to the debt already existing. Nothing herein contained shall prevent any county from issuing bonds, or other obligations, to fund or refund any indebtedness now existing or authorized by existing laws to be created."

The Legislature passed, in its 1927 Session, an Act to provide a code of laws authorizing and governing the issuance, sale, regulation, funding, re-funding, paying and retiring of bonds of the counties and municipal corporations. This Act is a complete enactment on the subject and supersedes the former provisions of our statutes on the same. It is Act No. 478, General Acts 1927, page 534, approved September 10, 1927, and is generally referred to as the Municipal Bond Code of 1927.

This Act has been amended several times. While some of these amendatory Acts may not be material to the question with which you are concerned, I here give you the citation of each of said Acts in the order in which the same were enacted:

Act No. 363, General Acts 1931, page 428, approved July 10, 1931; Act No. 489, General Acts 1931, page 601, approved July 22, 1931; Act No. 153, General Acts 1932, page 172, approved October 28, 1932; Act No. 213, General Acts 1932, page 215, approved November 8, 1932; Act No. 46, General Acts 1933, page 22, approved March 10, 1933; Act No. 47, General Acts 1933, page 29, approved March 10, 1933; Act No. 58, General Acts 1933, page 49, approved March 10, 1933; Act No. 70, General Acts 1933, page 60, approved March 15, 1933; Act No. 195, General Acts 1935, page 575, approved July 17, 1935.

Also, for your information, I list below citations of all cases by the Supreme Court of Alabama construing any of the provisions of said Municipal Bond Code of 1927 as amended:

Browder v. Gunter, et al., 220 Ala. 407; **Merchants' Securities Corporation v. City of Atmore**, 220 Ala. 682; **Frasch v. City of Prichard**, 220 Ala. 418; **Howard, City Clerk v. State ex rel. McGarry**, 226 Ala. 215; **Moore v. Howard, City Clerk**, 227 Ala. 219; **Phillips v. Atkins**, et al., 229 Ala. 15; **Carey v. City of Haleyville**, et al., 230 Ala. 401; **City of Marion v. Underwood**, 231 Ala. 225; **Garner, County Treasurer v. Jefferson County**, ex rel **Whistler**, 175 So. 352.

Of course, all of these decisions may not bear directly on the proposition before the governing body of your county, but I simply give them to you so that you may have a complete reference to all of the cases decided by the Supreme Court concerning any phase of the bond law.

It seems very clear from the provisions of Section 222 of the Constitution, above quoted, that the Legislature is without authority to pass a law authorizing a county to issue bonds unless such issuance is first authorized by a majority vote by ballot of the qualified electors of the county, though said section does give the Legislature express authority to pass laws authorizing the issuance of such bonds in compliance with the provisions of that section. The Municipal Bond Code of 1927, as amended by the Acts hereinabove cited, is the present law of the state, enacted by the Legislature in accordance with the provisions of Section 222, *supra*.

It seems very clear that your county can, by complying with the provisions of the Municipal Bond Code of 1927, as amended, *supra*, issue bonds as general obligations of the county in any amount up to, but not exceeding, the constitutional debt limit of the county, which debt limit is a mixed question of law and fact to be determined in the manner provided by Section 224 of the Constitution.

In connection with your inquiry I wish to refer you to Act No. 379, General Acts 1935, page 803, approved September 9, 1935, which is generally referred to as the County Financial Control Act. I particularly refer you to Section 9 of said Act, which gives authority for the issuance of refunding warrants for the purpose of refunding all warrants, etc., which are unpaid and past due at the time said Act went into effect and for the payment of which no money was available at the time; to Section 11 thereof, which authorizes the making of temporary loans in anticipation of the collection of taxes; and to Section 17 thereof, which provides for the issuance of interest bearing warrants for the purpose of paying emergency obligations as defined by said section. So far as I know, these are the only situations in which a county may issue its interest bearing warrants or certificates of indebtedness, and seemingly the situation before your county at the present time does not come in any of these categories.

Therefore, it would seem that the only way your county could issue bonds, etc., for the purpose of raising the funds with which to finance or partly finance its part of the road building program now under way in your county as general obligations of the county, is in the manner provided by the Municipal Bond Code of 1927, as amended, *supra*, which, of course, would entail the submission of the question to a vote of the qualified electors of your county.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 26, 1938.

Hon. L. C. Garrison,
Judge of Probate,
Walker County,
Jasper, Alabama.

Municipality has authority to impose license on common carrier which receives or discharges passengers or freight within said municipality even though it has no terminal facilities therein.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of January 28, 1938, in which you request my opinion as follows:

"A common carrier by truck, who has complied with the regulations of the Public Service Commission with the proper certificate, who has complied with the ICC, and who is paying the regular mileage tax, complying with all regulations, with rates prescribed, carries intra-state shipments, delivering same in corporate limits other than where it has a terminal.

"Under Section 77, sub-section (b) of the Alabama Highway Code, has a municipal corporation where a carrier operates a truck, and merely delivers packages or shipments which have been offered it, power to impose a privilege license for doing such business within the corporation?

"Where a carrier delivered packages or shipments as mentioned above and also accepts within such municipal corporation other packages or shipments to be carried to a destination outside of the corporation has a municipal corporation power to levy a privilege license for doing such business?

"I desire these questions answered that the same may clear up a situation in our municipal corporations within the county.

"I understand from the said sub-section that if a carrier merely passes through no license shall be charged, but if it accepts packages consigned to persons within the municipality, or accepts packages within the municipality consigned elsewhere, which it is its duty to do, would this be such a business as would be excepted under said section."

Section 77 (b) of the Highway Code, (1927 Acts, p. 346, at p. 377) reads as follows:

"Local authorities shall have no power or authority to charge a license or tax upon any motor carrier hauling passengers or any motor truck hauling freight for hire, when such motor carriers in the usual course of operations enter or pass through any county, municipality or town of this State. Provided this subsection shall not restrict the right of any municipality to charge a license for the privilege of maintaining or operating a terminal station, depot or waiting room therein." (Emphasis supplied).

Subsequently, in 1932, the Motor Carrier Act was passed, Section 40, of which provides as follows: (Gen. Acts, 1932, p. 189):

"Section 40. This Act shall not be construed so as to deprive any municipality within this State of its rights to regulate and control the use of its streets, or the right to regulate and control any motor propelled

vehicle operating within its corporate limits. Any incorporated city or town in this State shall have the right, by proper ordinance, to levy and collect reasonable, privilege license taxes from all common carriers and contract carriers where such common carriers or contract carriers do business in said town or city by maintaining depots, stations, or terminal facilities therein and/or by receiving passengers or freight for transportation for hire from said city or town to another point in Alabama, or from other points in Alabama to said city or town, provided, however, that said license or tax shall not exceed the sum of Twenty-five (\$25.00) Dollars in incorporated cities or towns of less than five thousand (5,000) inhabitants, and shall not exceed the sum of One Hundred (\$100.00) Dollars in incorporated cities or towns of over five thousand (5,000) inhabitants and less than twenty-five thousand (25,000) inhabitants; and shall not exceed the sum of Two Hundred (\$200.00) Dollars in incorporated cities or towns of more than twenty-five thousand (25,000) and less than one hundred thousand (100,000) inhabitants; and shall not exceed the sum of three hundred (\$300.00) Dollars in incorporated towns or cities of over one hundred thousand (100,000) inhabitants; the population to be computed on the basis of the last Federal census; provided, further, that any privilege license tax levied by any city or town within this State shall be fairly graduated in accordance with the number of motor vehicles operated by each motor carrier, and in accordance with the carrying capacity of busses and the weight of trucks." (Emphasis supplied).

It will be seen therefore, the former enactment permits the licensing of "a terminal station, depot or waiting room," and that the subsequent enactment mentions these three and then adds "or by receiving (or discharging) passengers or freight for transportation." The 1932 Act being the later enactment will prevail and the former enactment must necessarily be enlarged to this extent.

The fact that the provisions of Section 77 (b) of the Alabama Highway Code were accepted and made part of the Rules of the Road in the more limited terms, that is, including only "terminal station, depot or waiting room," would not have the effect of changing the 1932 enactment, as the Rules of the Road do not have the force and effect of a statute.

I therefore reach the following conclusions:

1. A municipality may not charge a license tax upon any motor carrier hauling passengers or any motor truck hauling freight for hire when such motor carrier in the usual course of operation merely enters or passes through such municipality.
2. A municipality may charge a license, as limited by Section 40 upon all common carriers and contract carriers doing business in a city or town by maintaining or operating a terminal station, depot, waiting room or other terminal facility therein.
3. A municipality may levy a license tax as limited by Section 40, upon all common carriers or contract carriers who receive passengers or freight for transportation for hire from the said city or town to another point in Alabama.
4. A municipality may levy and collect license tax as limited by Section 40, upon all common carriers or contract carriers who receive passengers or freight for transportation for hire from other points in Alabama to said cities or towns.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 26, 1938.

Hon. M. W. Forman,
Judge of Probate,
St. Clair County,
Ashville, Alabama.

Costs—Sheriff's fees incident to an inquisition of lunacy should be paid out of the lunatic's estate if solvent, otherwise by the county.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter of January 22, 1938, in which you state:

"We have had an inquisition as to whether or not a man was of sound mind. The Jury found him insane, and his wife has qualified as his Guardian. This man owns a farm which is encumbered and he is paid a pension from the Federal Government as a disabled Veteran.

You request my opinion as follows:

"Please advise whether or not under the above circumstances, the Sheriff would receive his pay for summoning jury and witnesses in this case from the county."

In answering your question, I am not attempting to pass on the solvency of the estate involved, as I do not have enough facts before me.

In my opinion you should collect the fees by execution out of the lunatic's estate. If the estate is insolvent, then the fees should be paid by St. Clair County.

Section 7287 of the Code of Alabama provides in part as follows:

"Section 7287. FEES ALLOWED TO SHERIFF.—Sheriffs are entitled to receive the following fees for the following services:

* * *

"Services in relation to persons of unsound mind, the same fees as are allowed for similar services in other cases, to be paid out of the county treasury, if such person have no estate."

See opinions of this office to Hon. M. C. Thomas, Sheriff, Jackson County, Alabama, under date of April 20, 1935, (Office Edition, Book 3, p. 312); Hon. B. Cooper, County Treasurer, Marion County Alabama, under date of April 28, 1931, (Office Edition, Vol. III, p. 312, March 1, 1931-April 30, 1931).

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 26, 1938.

Hon. John I. Smith,
Tax Collector,
Etowah County,
Gadsden, Alabama

Taxation—Exemption from ad valorem taxes cannot be prorated.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

This is to acknowledge your letter of February 5, which is as follows:

"I will appreciate your opinion with reference to the following matter that has arisen in this office.

"The Episcopal Church purchased from one O. C. Bottoms, on this day, a house and lot in Gadsden, for church purposes. It being the intention of the church to use the property as a parish house.

"The property has been assessed by Mr. Bottoms for the tax year and the church is claiming that the taxes should be pro-rated on the current assessment, that is, Mr. Bottoms should be assessed for taxes due to Feb. 5, 1938, and the remainder of the year exempted to the church.

"The assessor has taken the position that Mr. Bottoms is chargeable with the taxes for the entire year, notwithstanding that he sold the property to the church on Feb. 5th."

In reply to your inquiry, I advise that exemption from ad valorem taxes cannot be prorated. Ad Valorem taxes are due and payable on October 1 and become a lien against the property. **State vs. Doster-Northington Drug Company**, 196 Ala. 447, 71 So. 427. As an assessment is a judicial determination, it is final unless impeached for fraud or lack of jurisdiction, or reviewed by an appellate authority. **State vs. Mortgage Bond-Company of N. Y.** 224 Ala. 406, 140 So. 365.

To allow a proration of ad valorem taxes, merely because the property was sold to a church during the current tax year, would, in effect, authorize the remission of an obligation due the state. This is specifically prohibited by Section 100 of the Constitution of Alabama, 1901, which provides in part as follows:

"Section 100. No obligation or liability of any person, association, or corporation held or owned by this state, or by any county or other municipality thereof, shall ever be remitted, released, or postponed, or in any way diminished, * * *"

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 26, 1938.

Hon. S. G. Johnson,
Judge of Probate,
Lamar County,
Vernon, Alabama.

Courts of County Commissioners—have no authority to pay for stationery and record books used by surveyors.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of March 10, 1938, in which you request my opinion as follows:

"We have a regular licensed engineer and land surveyor in this county who calls himself a 'County surveyor'.

"He claims that as such County Surveyor he is a County official and entitled to stationery and supplies as are other county officials.

"He is not employed by the county, and if and when the county employs him it pays for such service as he may render.

"Please advise whether or not claims for stationery, record books for his surveying and etc. are legal claims against the county, and if allowed and ordered paid by the commissioners court amounts as paid him for such supplies, record books and etc.

"His records are not made a part of the public records and left here at the court house for public use and he does not have an office here, but lives out five miles from here."

I am of the opinion that your inquiry should be answered in the negative.

The provision of law authorizing counties to pay for postage, stationery, record books, etc. is found in Section 9604, Code of Alabama of 1923, as amended by Acts of 1927, page 693. Said section provides as follows:

"STATIONERY OF OFFICERS PAID FOR BY COUNTY.—The judge of probate, tax assessor, tax collector, register of the circuit court in equity, clerk of the circuit court, sheriff and the county treasurer or custodian must be allowed reasonable expenses, for suitable books, stationery, postage stamps used exclusively for official business, and telephones to be paid for by the county, on the approval of the court of county commissioners, board of revenue or other like governing body, and the judge of probate shall also be allowed expense for his seal of office, to be paid for by the county."

It is to be noted that said section authorizes the county to furnish stationery and supplies to the certain officers enumerated therein.

While Section 10345, et seq. authorize the appointment of surveyors by the court of county commissioners of the county, I find no authority in these sections or in Section 9604, as amended, which authorizes the county to furnish such surveyors with record books and other supplies. Whatever powers courts of county commissioners, boards of revenue or other like governing bodies may have is derived from the Legislature. They have no inherent constitutional powers—**Biennial Report of the Attorney General, 1928-1930, page 645 and cases cited.**

You are therefore advised that the claims for stationery, record books, etc. filed by the party mention in your inquiry are not legal claims against the county, and you are without authority of law to pay them.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 26, 1938.

Hon. John T. Frazer,
Judge of Probate,
Lee County,
Opelika, Alabama.

Licenses—No license required of person engaged solely in the business of operating a radio repair shop.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of March 3, 1938, in which you request my opinion as follows:

"I respectfully request your opinion as to whether or not the Revenue Act of 1935 levies a privilege license for the sole purpose of repairing radios.

"Schedule 117 of said Act levies a license on the business of selling radioes, but does not require a license for repairing radios.

"Some of the State license inspectors have insisted that a person operating a radio repair shop, from which no sales of radios are made, should procure a license under Schedule 56 of said Act, which covers 'dealers in electric, gas or other mechanical refrigerators, electric or gas heaters, electric or gas water heaters, electric or gas stoves, and/or for each electrical or gas repair, or electrical or gas supply shop. . .'"

In my opinion there is no license imposed by the General Revenue Laws of 1935 upon persons engaged solely in operating a radio repair shop. As you state, Schedule 117 of said Act levies a license on the business of selling radios and manifestly is not applicable to a party who does not sell radios but only repairs them.

Schedule 56 of the General Revenue Laws of 1935, to which you refer, provides as follows:

"For each dealer in electric, gas or other mechanical REFRIGERATORS, electric or gas HEATERS, electric or gas WATER HEATERS, electric or gas STOVES, and/or for each **electrical** or gas **repair**, or electrical or gas **SUPPLY SHOP**: In cities of:

"100,000 or over	\$30.00
50,000 to 100,000	20.00
10,000 to 50,000	10.00
Less than 10,000, whether incorporated at not	5.00"

There is a well-known and ancient maxim "ejusdem generis", which rule of construction may be resorted to if the intention of the statute is not clear.

The rule of "ejusdem generis" means that, where a general term in a statute follows specific words of like nature, it takes its meaning from the latter, and is presumed to embrace the persons or things of the kind designated by the specific words. 1 Words & Phrases, 4th Series, page 844.

Applying the doctrine of "ejusdem generis" to the foregoing provision, the word "electrical", as underlined in the above quoted section, would appear to refer to electrical refrigerators, heaters, water heaters, stoves, etc., rather than to radios. I therefore advise you that the words "electrical * * * repair * * * shop", as used in Schedule 56, apply not to a shop wherein radios are repaired, but to the shops catering to the repair of the particular devices or appliances designated in the statute.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 26, 1938.

Hon. T. C. Almon,
County Solicitor, Morgan County,
Decatur, Alabama.

The election provided for by Act No. 114, Acts of 1936-37, page 118, which act proposes an amendment to the Constitution of Alabama relative to Morgan County, should be held at the general election in November, 1938.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt of your letter of February 19, 1938, which is as follows:

"At the extra session, 1936 and 1937, a constitutional amendment was passed which affects only Morgan County. This amendment is found on page 118, General and Local Acts of Alabama. In reading paragraph 2, I noticed the beginning of the paragraph is as follows:

"Section 2. It is ordered by the Legislature that an election by the qualified electors of the State of Alabama upon the aforesaid proposed amendment to be held at the next general election succeeding the present session of the Legislature."

"Please advise me if it is your opinion that this election can be held at the time of the next primary or is it your opinion that this would have to be held at the November election."

Act No. 114, Acts of 1936-37, Extraordinary session of the Legislature of Alabama, passed by the House of Representatives on January 8, 1937 and by the Senate on February 6, 1937, authorizes an election to be held by the qualified electors of the State of Alabama to determine whether or not the Constitution of Alabama shall be amended so as to allow Morgan County to issue bonds, the revenue to be received therefrom to be used for certain stated purposes. That part of the Act which is pertinent to your inquiry is the first sentence of Section 2, which is as follows:

"It is ordered by the Legislature that an election by the qualified electors of the State of Alabama upon the aforesaid proposed amendment

be held at the next general election succeeding the present session of the Legislature."

The 1936-37 session of the Legislature, which passed said Act No. 114, adjourned sine die on the 26th day of February, 1937. The question then presents itself as to what the Legislature intended by the use of the words "next general election."

In my judgment, by the use of the words "next general election" the Legislature had in mind the election provided for in Section 416, Code of Alabama, 1923, which section is as follows:

"416. TIME OF GENERAL ELECTIONS.—The governor, lieutenant-governor, attorney-general, state auditor, secretary of state, state treasurer, superintendent of education, commissioner of agriculture and industries, senators and representatives in the legislature, and a sheriff in each county, and other officers not otherwise provided for, shall be elected on the first Tuesday after the first Monday in November, 1910, and every fourth year thereafter. A president of the public service commission and a state commissioner of conservation shall be elected on the first Tuesday after the first Monday in November, 1908, and every fourth year thereafter. Two associate public service commissioners shall be elected on the first Tuesday after the first Monday in November, 1910, and every fourth year thereafter."

I do not believe that the election could be legally held at any time prior to or later than the first Tuesday after the first Monday in November, 1938.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 26, 1938.

Hon. Nathaniel Almon,
County Supt. of Education,
Lawrence County,
Moulton, Alabama

Schools—The term "per annum," as used in Act No. 160, S. 126, approved March 2, 1937, (General Acts 1936-37, page 181) in connection with maximum expense of \$600.00 per annum allowable to certain County Superintendents of Education, is construed to mean the year running concurrent with the years of the terms of office of the superintendents affected.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of February 8, 1938 which is as follows:

"The Legislature in 1937 passed a bill allowing Superintendents of Education whose salaries did not exceed \$3,000 and was not already allowed an expense account. The expense account is not to exceed \$600 per year. This county falls in that group, and I am desiring some information as to when the year begins, so will appreciate your answer on the following question.

"When is the official year of this expense bill to begin? In my mind there are three possible dates. March 1st when the bill went into effect, Jan. 1st, and October 1st which begins the official fiscal year.

"Please inform me which of the above dates or what date is my expense year begins? This is very important to enable me to keep our records and expense account correct annually as required by this recent act."

In answer to your inquiry, it is my opinion that the term "per annum" as used in Act No. 160, S. 126, approved March 2, 1937 (Gen. Acts 1936-37, p. 181) in connection with the maximum expense allowance allowable certain County Superintendents of Education, means the year running concurrently with the year of the terms of office of the Superintendents affected. In other words, it is the official year or year of office.

The act under consideration is as follows:

"Section 1. The Boards of Education in Counties, where the maximum salary of the Superintendent of Education is prescribed by law, are hereby empowered to fix, approve, and authorize the payment of the travelling expenses incurred by the Superintendent in the performance of his official duties within the County and the expenses incurred by him when his official duties require him to go outside of the County.

"Section 2. The Superintendent of Education, whose expenses are authorized to be paid under the provisions of this Act, are hereby required to file with the County Board of Education on or about the 1st day of each month a certified itemized statement of the traveling expenses incurred by him in the performance of his official duties within the County and the expenses incurred by him when his official duties required him to go outside of the County, for the preceding month, upon forms to be prescribed by the State Board of Education. Upon the approval by the County Board of Education of the expenditures herein authorized, the same shall be paid as other obligations. The accounts shall be verified by affidavit, and the total of such accounts shall in no event exceed **the sum of Six hundred Dollars per annum.** (*Italics Supplied*).

"Section 3. It is hereby expressly declared that it is not the legislative intent of this Act to increase the salary of the Superintendent of Education of any County of the State but merely to reimburse the Superintendent for necessary and legitimate traveling expenses actually incurred in the efficient performance of his duties. The provision of this Act shall not apply to Superintendents of Education whose salaries amount to three thousand dollars per annum or more nor to any Superintendents of Education who receive expenses under local acts heretofore passed by the Legislature of Alabama.

"Section 4. All laws and parts of laws in conflict herewith are hereby repealed.

"Section 5. This Act shall take effect immediately upon its passage and approval by the Governor.

"Section 6. Provided, however, this Act does not repeal or invalidate any general Act on the subject which has local application based on a County population basis.

"Approved March 2, 1937."

As used in statutes the meaning of the term in question is dependent on the subject matter and the connection in which it is used. It may be a period of twelve months or twelve calendar months beginning on a day other than the first day of January. It may mean a political year or a period between two elections, **official year or year of office**, a college year, a school or scholastic year, a fiscal year, an excise year, a license year, etc., 62 C. J. 965 & 966.

Construing the act in question as a whole it is my opinion that the term "per annum" which modifies the \$600 maximum expense allowance, means an official year or year of office. The act provides that it shall not apply to Superintendents whose salaries amount to \$3,000.00 per annum or more. The term there used clearly refers to the official year or years of office. All sections of the act must be construed in *pari materia*.

In order to effectuate the purpose of the act without endless confusion and ambiguity as to the different county superintendents that may be affected, the above construction of the term under consideration is necessary. The terms of office of the various county superintendents affected vary both as to the beginning and the length and any other construction than above would be practically unworkable. If the term were given any other meaning, a county superintendent whose term expired before the year as otherwise computed could possibly receive the maximum expense allowance, and his successor would be without said allowance until said year had elapsed. If term is computed concurrently with the years of the term of office, this situation is avoided.

The above conclusion in my judgment expresses the true legislative intent as to the meaning of the term under consideration. Statutes are given a practical and workable construction when possible.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 26, 1938.

Hon. J. F. Laseter,
Judge of Probate,
Barbour County,
Clayton, Alabama.

Where instrument offered for recording is a retention of title contract, a mortgage tax should be charged on the balance due as indicated in the instrument, and a deed tax should be paid on the difference between this amount and the value of the property conveyed.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your communication of recent date as follows:

"Enclosed you will find two copies of mortgages that are now being used by these two automobile dealers in Barbour County. Please give me an opinion as to whether or not I will be required to charge a deed tax on each of the papers enclosed."

I have carefully examined the two instruments which you enclosed. The first, that headed "Contract for Recording," appears clearly to be a retention of title contract.

In reference to the second instrument, while it appears on its face to be a simple mortgage, your notation indicates that it has come to your knowledge that it is used in the sale of new automobiles and that it is in effect also a retention of title contract. When this is ascertained, it is your duty to govern yourself by this information. **Thompson v. Smith**, 27 Ala. App. 460, 174 So. 796; **Long v. Jasper Land Co.**, 217 Ala. 593, 117 So. 210, 211.

Where instrument offered for recording is a retention of title contract, a mortgage tax should be charged on the balance due as indicated in the instrument, and a deed tax should be paid on the difference between this amount and the value of the property conveyed.

See **Thompson v. Smith**, *supra*.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 26, 1938.

Hon. D. B. Borden, Clerk,
Circuit Court, Hale County,
Greensboro, Alabama

1. When a confession of judgment in a criminal case is taken in open court by the Presiding Judge it is approved by him.

2. When a confession of judgment in a criminal case is taken in open court, it is governed by the civil law as to execution and other procedure.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of February 7, 1938 in which you request my opinion as follows:

"1. Who is supposed to approve sureties for a confession of judgment in County and Circuit Courts?

"2. When a confession of judgment is made in open court how much time should expire before an execution should be issued?"

If a confession of judgment in a criminal case is taken in open court by the presiding judge as is provided by Section 5288, Code of Alabama, 1923, it should be approved by him. If the presiding judge takes the confession, the fact he takes the same is an approval of the confession.

Answering your second request as soon as the confession is made or taken in open court it becomes a civil procedure and is governed by the same law as to execution and otherwise as other civil matters. **Goldsmith vs. Mayor Alderman at Huntsville**, 120 Ala. 182. Section 5289, Code of Alabama, 1923.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 26, 1938.

Hon. Earl C. Adams, Clerk,
Juvenile and Court of Domestic Relations,
Montgomery County,
Montgomery, Alabama.

Juvenile Courts—

Suspended sentence—Under Section 4488 Code of Alabama 1923, duration of sentence having expired, no further contribution can be demanded under said sentence

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I am in receipt of your letter as follows:

“Section 4488 of the Code of Alabama provides that at the trial, after conviction and sentence, the Judge may suspend the sentence, and order the Defendant to pay a certain sum, at stated intervals, and release the Defendant, upon his own recognizance or bond, the condition of which, being that the Defendant will appear when ordered to do so, within one year.

“Mr. A was convicted in this court one year ago, and given a sentence of twelve months, hard labor, from Montgomery County; the sentence was suspended upon the condition that he pay \$5.00 weekly, and he was released from custody, upon his own recognizance. Mr. A has paid the \$5.00 per week for one year and now insists that he is not liable, under the judgment and sentence.

“Please give us an Official interpretation of this Section and advise us whether or not Mr. A is liable, and should be required to contribute further under said Judgment.”

Your question must be answered in the negative. Without considering the constitutionality of Section 4488 Code of Alabama 1923, the time of the sentence given Mr. A in your case having expired, any further restraint of his liberty would be illegal see *Scottsboro v. Johnston*, 121 Ala. 397; *State v. Jackson*, 143 Miss. 745. So, any attempt at this time to enforce the original sentence of the court would be illegal. Therefore he cannot be compelled or required to contribute anything further under the judgment and sentence of the Juvenile and Court of Domestic Relations. Compare *Crossley v. State*, 25 Ala. App. 284, 144 So. 170.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 28, 1938.

Hon. D. B. Borden, Clerk,
Circuit Court of Hale County,
Greensboro, Alabama.

Witness Fees—

1. State Highway Patrol officer is not entitled personally to witness fees in criminal cases—such fees are payable to the State Highway Patrol Fund.

2. Agents of the Alabama Beverage Control Board are entitled to witness fees and mileage when appearing as witnesses in criminal cases.

3. It is the duty of the clerk to issue a certificate to a witness for the miles traveled in reaching the court from and to his residence by the usually traveled route.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I am in receipt of your letter of recent date wherein you request the following:

"Please give me an opinion on the following: Should members of the A. B. C. Board and the Alabama Highway Patrol be paid witness fees and mileage in cases that are tried in Circuit Court, where the members of such departments have arrested violators of the law? If so, should more than one person be paid mileage when they travel in the same automobile? If such a payment is lawful what point is supposed to be the place traveled from in order to attend court by members of the A.B.C. Board and the State Highway Patrol?"

Members of the Alabama Highway Patrol are to be paid witness fees, but by the Laws of 1935, Section 11 thereof, at p. 760, it is provided that:

"Provided, however, that no State Highway Patrol Officer shall be entitled to any costs for attending any courts, but instead, the proper authorities shall collect such fees and mileage that are due such officers for attendance on any court or for any official act and to promptly turn same into the Highway Patrol Fund, * * *"

See also opinions of the Attorney General, Quarterly Reports, Vol. VI, p. 108 and Vol. VIII, p. 117.

Agents and members of the Alabama Beverage Control Board are entitled personally to be paid witness fees and mileage in cases that are tried in Circuit Courts, when they are subpoenaed as witnesses. See Quarterly Report of the Attorney General, Vol. VIII, p. 258; Vol. VI, p. 17; Vol. IV, p. 23 and Vol. III, p. 35.

For the purpose of the accrual of witness fees and mileage, law enforcement officers of the State are considered as any other individual who might appear as a witness. Section 7233, Code of Alabama, 1923, provides that witness are allowed mileage "to and from their residences by the usual traveled route, * * *" and Section 7234, Code of Alabama, 1923, provides that the Clerk of the Circuit Court must on application of the witness, and upon oath, give to him a certificate setting forth among other things the number of days attended and the sum to which he is entitled for his attendance and mileage.

The oath of the witness as provided by Section 7234, *supra*, is for the protection of the clerk and at the same time to secure the making of a proper certificate and the Supreme Court has held in *Fridde vs. Braun*, 7 Ala. App. 429, 61 So. 57, that the oath is not a mandatory prerequisite to the validity of the certificate, but in the words of the court at p. 433, "The clerk may properly issue the certificate if he has knowledge of the correctness of the items sought to be charged by the witness, without requiring oath to be made of facts already within his knowledge, but must issue it when the witness accompanies his application with an oath as to correctness of the items." (Italics the Court's).

Therefore, it is my opinion that where the witness makes his oath, he is to be given a certificate showing the mileage to be paid from and to his residence by the usually traveled route without considering how the witness reached the court.

Section 7233, Code of Alabama, 1923, uses the residence of a witness as a starting point. The courts in interpreting this section have held that witnesses are entitled to fees for the whole number of miles traveled even when in excess of one hundred miles. See **Alabama Midland Railway Co. vs. Rushing**, 103 Ala. 542, 15 So. 853.

The word residence as used above does not mean domicile, but is to be considered as meaning the place where the witness now resides even though such residence be temporary. See opinion of Attorney General, Quarterly Reports, Vol. VIII, p. 166. In the case of the State Highway Patrol and agents of the Alabama Beverage Control Board, under the facts you supply me, the word "residence" would mean the place where they were stationed at the time they were to appear as witnesses.

Therefore, it is my opinion that agents of the Alabama Beverage Control Board and members of the State Highway Patrol are to be paid mileage for the actual number of miles traveled in reaching the court from and to their residence by the usually traveled route; subject, however, to the limitation expressed in the Laws of 1935, supra, that in the case of the State Highway Patrol, the fees are to be paid directly to the Highway Patrol Fund.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 29, 1938.

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Where the State is garnisheed, the State Comptroller or other employee acting in his stead is entitled to the fee paid in such cases.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt of your letter of January 5, 1938, which is as follows:

"I wish to call your attention to Section 8086 of the Code of 1923 relative to Garnishee recovers his costs on a discharge. Said section states that when the answer of the garnishee is not controverted, or, if controverted, is found for him, he shall be allowed in courts of record three dollars per day during his attendance, when such attendance required, together with five cents per mile, computed according to the usual route traveled, going to and from Court; and when the personal attendance of said garnishee is not required he shall be allowed three dollars for such answer etc.

"Please advise me if the three dollars for answering a garnishment is a fee that belongs to the State Comptroller as an individual or does this fee belong to the State of Alabama."

I am of the opinion that any fee received for answering garnishment is the property of the official or employee so answering and such fee need not be paid into State funds.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 31, 1938.

Hon. Joe M. Pelham, Jr.
Circuit Judge,
Washington County,
Chatom, Alabama.

1. Elections—Individual performing duties of Judge of Probate or other officer disqualified from performing duties relative to absentee ballots, not entitled to compensation therefor.

2. Chairman of the Democratic Executive Committee who is running to succeed himself, is disqualified from performing duties relative to absentee ballots.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of March 22, 1938, which is as follows:

"Please see Acts of Extra Session of 1933, page 193.

"Under this act the Judge of Probate and the Sheriff of Washington County are both disqualified to handle absentee ballots on May 3, 1938 because they are candidates for office. I have appointed Janice W. Blount, a qualified voter of that county, to act.

"I would like to know whether or not Janice W. Blount would be entitled to pay for her services.

"John G. Kimbrough, the present Chairman of the Democratic Executive Committee of Washington County is a candidate to succeed himself. Please see Section 4 of this act. I would like to know whether or not this would be construed to be an office he is seeking and whether or not he would be disqualified. I have written him about the matter but he has not certified his disqualification."

Your first inquiry has been answered in the negative by an opinion of this office rendered to Hon. E. H. Parsons, Huntsville, Alabama, on May 22, 1934. (Opinion of Attorney General, Vol. 17, p. 199, Office Edition).

I am of the opinion that your second inquiry should be answered in the affirmative. Section 4 of Act 178, S. 27, approved April 29, 1933, (Acts 1933, p. 193) provides in part as follows:

"Section 4. In any primary election which may be held in any county in this State, in which the chairman of the executive committee of the political party holding such primary is a candidate for nomination to any office, such chairman shall be disqualified from performing any of the duties with reference to the handling of absentee ballots which are now required to be performed by him. * * *

The question here presented is whether or not the term "any office" includes the Chairman of the County Executive Committee. We note that this section refers to primary elections. In the primary election law of 1931 (Acts 1931, p. 73) "county office" or "county officer" shall include members of the County Executive Committees of political parties (See Section 60 (f)). Since a member of county executive committees of political parties is a "county officer" within the meaning of the Primary Act of 1931, and since Section 4 of the 1933 Act, *supra*, refers to primary elections, it is my opinion that the term "any office" as used in Section 4 of the 1933 Act, includes members of the County Executive Committees of political parties, which necessarily includes the chairman thereof. The two acts in question must be construed in *pari materia*.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 31, 1938.

Hon. W. P. Russell,
Custodian School Funds,
Lowndes County,
Hayneville, Alabama.

Schools—Custodian of County School Funds—

County board of education has the authority and power to remove the custodian of county school funds at will and for such reasons as to it seems fit and proper.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"Under date of March 18, 1938, I received the following letter, signed J. A. Coleman, Superintendent:

"The Lowndes County Board of Education has authorized me to notify you that beginning April 1, 1938, the Lowndes County School Funds will be handled through the office of the County Superintendent of Education. As your services will no longer be needed, as of the above date, the Board requests that you submit your resignation, dating it effective March 31, 1938."

"On January 29, 1936 I was elected or appointed to serve as custodian of county school funds, beginning with that date and continuing until October 1, 1940. I made bond required for my term of office and have served as custodian up to the present time.

"It is my understanding that a school treasurer or custodian can be dismissed from office only for misappropriation of funds or for legal abuse of his office. As no such question has arisen in this case I can see no reason for my resignation.

"Even though school funds are handled through the office of the county superintendent of education some one must be placed in charge of these funds and bond made for their proper distribution.

"I will appreciate very much if you will let me have an opinion from you as to whether the above action of the Lowndes County Board of Education means my legal dismissal from office and also whether my resignation as requested is compulsory."

In my opinion, the County Board of Education of Lowndes County has plenary power to remove the custodian of school funds appointed by it at such time as it sees fit and for such reasons as to it seems proper.

The custodian of county school funds, provided by Acts of 1935, page 1909, serves in lieu of the county treasurer of school funds provided by Article XV of the School Code of 1927.

By Section 300 thereof it was specifically provided that "The county treasurer of school funds may be removed by the county board of education when, in the opinion of the said county board of education, the best interests of the school may require."

It is my judgment that the above-quoted section is still effective to empower the county board of education to remove the custodian of county school funds, although the same is strictly applicable only to the county treasurer of school funds.

But, the authority to remove is not grounded solely upon the express statutory grant.

It is a cardinal rule that the power to appoint an officer or employee and fix his term of office or employment carries with it, as a necessary incident, in the absence of constitutional or statutory restraint, the power to remove the appointee. *Touart v. State*, 173 Ala. 453, 461.

So that, even in the absence of statutory grant of the power to remove,—there being no constitutional or statutory restraint upon such removal, the county board of education has the power to remove such officer.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

Omitted From Vol. 8

September 24, 1937

Hon. Frank O. Deese,
Judge of Probate,
Dale County,
Ozark, Alabama.

Act No. 157, General Acts, 1936-1937, page 179, approved March 4, 1937, and effective July 1, 1937—Said Act provides that per diem and mileage of members of county governing bodies, while engaged in supervising highway construction and maintenance, shall be paid out of the Gasoline Tax Fund.

Opinion by the Attorney General.

Dear Sir:

I have your letter which follows:

"I would like your opinion as to whether, under House Bill 157, Senate 83, recently approved and to become effective July 1, 1937, the per diem and mileage of county commissioners may be paid from the gasoline tax fund."

The Act to which you refer in your letter of inquiry is Act No. 157, General Acts 1936-1937, at page 179, approved March 4, 1937 and effective July 1, 1937. This act reads as follows:

"Section 1. The revenue, less the cost of collection, obtained from taxes on lubricating oil, gasoline, naptha, and other liquid motor fuels or any device or substitute therefor, commonly used in internal combustion engines as is provided for in Schedule 156.1 of House Bill 324, approved July 10, 1935, shall not be used for any purpose other than for the construction, improvement, and maintenance and supervision of highways and bridges and streets, including the retirement of bonds for the payment of which such revenues have been pledged, and for no other purposes. The payment of the per diem and mileage of members of County governing bodies when engaged in supervising the construction, improvement and maintenance of highways, bridges and streets shall be construed as supervision under the provision of this Act.

"Section 2. All laws and parts of laws, general, local and private, in conflict herewith are hereby repealed.

"Section 3. This Act shall go into effect July 1, 1937.

"Approved March 4, 1937."

In my opinion this act provides that the per diem and mileage of the members of county governing bodies, while engaged in supervising highway construction and maintenance, not only may, but shall, be paid out of the Gasoline Tax Fund, from and after its effective date.

As you know, the Supreme Court of Alabama, speaking through Mr. Chief Justice Anderson, decided in the case of **Weaver v. Tidwell**, 228 Ala. 169, that the per diem and mileage of members of a county governing body could not be paid out of the Gasoline Tax even while they were engaged in the construction and maintenance of roads. The decision in that case, however, was based on the fact that Section 6771 of the Code of Alabama, 1923, as subsequently amended, which is the section providing for the compensation of

members of county governing bodies, provides that they shall be paid out of the county treasury, and the Supreme Court held in that case that "county treasury" meant the general fund of the county. The decision was not rested on a finding that the payment of per diem and mileage members of county governing bodies while engaged in supervising highway construction and maintenance, out of the Gasoline Tax fund, amounted to a diversion of that fund to a purpose other than those for which it was appropriated, namely, road construction and maintenance. That question was not dealt with in the opinion of the Supreme Court.

Act No. 157, *supra*, expressly provides that the payment of the per diem and mileage of members of county governing bodies when engaged in supervising highway construction and maintenance shall be construed as supervision, and supervision of the highways and bridges and streets is one of the purposes to which the said Act restricts the use of the Gasoline Tax Fund. The Gasoline Tax fund, and not the general fund of the county, is the fund primarily liable for the payment of expenses incurred by the county in highway construction and maintenance. It was for this general purpose that this tax was levied and to which its proceeds are appropriated. As above stated, this Act restricts the use of these funds to this general purpose.

Construing Act No. 157, in the light of the purpose for which the Gasoline Tax was levied and to which the proceeds from said tax are appropriated case of *Weaver v. Tidwell*, *supra*, it is obvious that the purpose of the process of *Weaver v. Tidwell*, *supra*, it is obvious that the purpose of the provisions of the said Act, to the effect that the payment of the per diem and mileage of members of county governing bodies when engaged in supervising highway construction and maintenance should be construed as supervision, was to remedy the situation resulting from the decision of the Supreme Court in the *Weaver v. Tidwell* case—that is, to relieve the general fund of this burden which it was required to bear as a result of the decision in that case. There seems to be no logical reason why the payment of the per diem and mileage of members of county governing bodies, while they are engaged in supervising highway construction and maintenance, should not be paid from the Gasoline Tax fund, which is set up for the express purpose of paying the expenses incurred in the construction and maintenance of highways. At the same time, there seems to be ample reason why the general fund, with all of the many claims against it, should be relieved of this burden, especially since there is a special fund set up for the general purpose of paying the expenses incurred in the construction and maintenance of highways. Evidently, the legislature deemed it advisable that this should be done. In my opinion, such was the reason for the provisions of this act in regard to the payment of per diem and mileage of the members of county governing bodies when engaged in supervising highway construction and maintenance. Therefore, it is my opinion that the word "shall" as used in the said Act is mandatory, and that from and after the effective date of this Act the per diem and mileage of members of county governing bodies, when engaged in the supervising of construction and maintenance of highways, not only may, but shall be paid out of the Gasoline Tax fund.

Of course, county governing bodies still have the right to appropriate money from the general fund to be used for highway construction and maintenance purposes, including the payment of the per diem and mileage of the members of county governing bodies while engaged in supervising highway construction and maintenance, after all involuntary obligations against the general fund (that is, all obligations against the county, the payment of which out of the general fund is made mandatory by statute) have been met. But this can only be done, when there is a surplus in the general fund after all involuntary obligations against said fund have been met. See *Rhodes v.*

Marengo County Bank, 205 Ala. 667; Opinion of the Attorney General to Hon. L. H. Reynolds, Judge of Probate, Chilton County, Clanton, Alabama, under date of Oct. 15, 1931, Office Edition 6, page 262. This opinion is not to be construed as holding that the county governing bodies do not still have this authority to so transfer monies in the general fund for the payment of the per diem and mileage of members of county governing bodies while they are engaged in supervising highway construction and maintenance, when a surplus exists in the general fund.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

I N D E X

January, February & March, 1938

	Page
“A”	
ACTS—General and Local:	
GENERAL ACTS 1900-01:	
Page 2024	167
GENERAL ACTS 1927:	
Page 367	38
Page 390	38
Page 693	183
GENERAL ACTS 1931:	
Page 73 (Section 16a)	56
Page 218	12
Page 557	169
Page 759	74
GENERAL ACTS 1932:	
Page 68	170
GENERAL ACTS 1933:	
Page 19	127
Page 51	127
Page 193	193
Page 203	169
Page 203	50
GENERAL ACTS 1935:	
Page 24	7
Page 43	88
Page 70	114
Page 162	88
Page 397	118
Page 581	74
Page 714	70
Page 756	38
Page 803	88, 176
Page 950	79
Page 897	115
Page 950	33
Page 950 (See Unemployment Act)	
Page 967 (Sections 8, 10, 15)	146
Page 989	84
Page 990	88
Page 1909	194
GENERAL ACTS 1936:	
Page 4	40
Page 113 (See Homesteads)	
Page 141	135

INDEX—Continued

	Page
GENERAL ACTS 1936-37:	
Page 40	135
Page 108	77
Page 118	185
Page 125 (See Sales Tax Act)	
Page 158	146
Page 179	195
Page 181	186
Page 217	33
Page 225	141
Page 229	38
Page 268	10
Page 277	67
Page 279	21
LOCAL ACTS 1923:	
Page 272	10
LOCAL ACTS 1931:	
Page 23	152
LOCAL ACTS 1936:	
Page 54	172
LOCAL ACTS 1936-37:	
Page 22	22
ABSENTEE BALLOTS:	
Chairman Democratic Executive Committee running to succeed himself, disqualified from handling	193
Judge of Probate, running to succeed himself, disqualified from handling	193
AGRICULTURE AND INDUSTRIES DEPARTMENT:	
Court Costs where Department is party	7
AGRICULTURAL CODE 1927:	
Section 488	7
ALABAMA BEVERAGE CONTROL ACT:	
Agent as witness in criminal case	190
Billboard, no authority of board to regulate by rules	110
Liquor referendum, certain expenses in	25
Montgomery County, intoxicating liquors, seizure of vehicle illegally used to transport liquor	136
National Guard Commissary not exempt from tax	135
Per diem of member appointed to fill out term	5
ATTORNEYS:	
Deputy tax collector, may be employed as attorney for county	141

INDEX—Continued

Page

"B"

BANKHEAD COOPERATIVE ASSOCIATION:

Income tax	118
------------------	-----

BLOUNT COUNTY:

Taxation, dam owned by City of Birmingham	105
---	-----

BOARD OF REGISTRARS:

Notices, publication and posting of, payment therefor	69
Residence, mixed question of law and fact	84

BONDS:

Ala. Bridge Bonds, sinking fund of county cannot be invested in	55
County surveyor	169
Highway Department, substitution of contract bond	114
Interest bearing warrants against general fund or gasoline fund, authority to issue	176
Municipality giving mortgage to secure, filing fee	145
Notary Public, approval by Judge of Probate	50
Surplus in sinking fund used to construct county office building	74

BUDGET ACT:

Claims, preference	88
County Treasurer may make supplemental budget	88
County governing body, duty to prepare budget	88

BUILDING & LOAN ASSOCIATION:

Franchise tax, application for refund	175
Receivership, claims of stockholders	12

BULLOCK COUNTY:

Deputy Solicitor of Bullock County may receive expenses for services rendered county	51
Salary of county solicitor and deputy solicitor	77

"C"

CODE OF ALABAMA, 1923:

Section 186	133
Section 231	88
Section 317	127
Section 366	53, 84
Section 375	69
Section 381	161
Section 385	84
Section 386	69
Section 392	84
Section 427	68
Section 588	150
Section 1064	117
Section 2294 (61)	74

INDEX—Continued

	Page
Section 2575 (7)	79
Section 2584-5	152
Section 2619	167
Section 2873	78
Section 2880	115
Section 2882	115
Section 3242	174
Section 3558	20
Section 3650	174
Section 3665	117
Section 3854	73
Section 4039	65
Section 4039	35, 54
Section 4247	61
Section 4488	190
Section 4781-2	136
Section 4811-3	106
Section 4878	47
Section 5024	51
Section 5136	10
Section 5288	189
Section 6518	7
Section 6755 (22)	74
Section 6789	88
Section 7233	190
Section 7862	125
Section 7914	40
Section 7918	40
Section 7952	40
Section 8086	192
Section 8942	125
Section 9241	50
Section 9604	183
Section 10189	87
Section 10347	169
 COMMON CARRIER:	
Municipal license, where no depot maintained for freight discharged	179
 CONSTITUTION, 1901:	
Amendment No. 27	175
Section 65	61
Section 178	84, 161
Section 181	161
Section 280	79
 CONSTITUTIONAL AMENDMENT:	
Morgan County, time for holding election	185
 CONSTITUTIONALITY:	
Local Act 1936-37, p. 22 (County Court of Russell County)	22

INDEX—Continued

	Page
CONTRACTS:	
County Board of Education not authorized to pay contractor amount deducted by WPA for breach of contract	168
Highway department substitution of contract bond	113
CONVICTS:	
Confession, in criminal case, taken in open court	189
Serving sentence pending appeal, case reversed and remanded, cannot claim transportation home	174
COOPERATIVE ASSOCIATION:	
Income tax	118
CORPORATIONS:	
Building & Loan Association receivership, claims of stockholders	12
COSTS:	
Agricultural Department, party to suit	7
Confession in criminal case, taken in open court	189
Milk Board, party to suit	7
Minor, suit brought by next friend	90
Non-resident, collection of	90
COUNTIES:	
County surveyor, payment of stationery, record books	183
Deputy tax collector may be employed as attorney for county	141
Sub-dividing precinct	68
Equitable claim, tractor company advancing tractor	133
Farm home demonstration agent, authority of County Board of Education to pay	70
Farm Security Administration Program, authority to pay agent	132
Gasoline tax, authority to issue warrant against, includes authority to pay interest thereon	60
Guard for prisoner confined in hospital, payment of	106
Interest bearing warrants against gasoline fund, authority to issue	176
Interest bearing warrants against general fund, authority to issue	176
Janitor for jail, authority to appoint	102
Janitor for courthouse, authority to appoint	102
Relative, within third degree, of member court of county commissioners, holding office as county treasurer	99
Roads, per diem and mileage of commissioner inspecting payable from gasoline fund	195
Payment of expenses of tax collector for visiting each voting place	103
Sinking fund of county cannot be invested in Alabama Bridge Bonds	55
Surplus in sinking fund used to construct county office building	74
Tax Assessor, payment of expenses for visiting each voting place	103
WPA, no authority to pay for transportation of workers to sewing room project	132
COUNTY BOARD OF EDUCATION:	
Custodian county school funds, removal of	194
Farm Demonstration agent, home demonstration agent, authority to pay	70

INDEX—Continued

	Page
Insurance on buildings	29
Lease of building from town of Louisville	29
No authority to pay contractor amount deducted by WPA for breach of contract	168
COUNTY BOARD OF HEALTH:	
Midwife, fee for issuing permit	117
COUNTY SUPERINTENDENT OF EDUCATION:	
Expense allowance, "per annum" construed	186
Incumbent, holds over until beginning of successor's term	152
COUNTY SURVEYOR:	
Bond of	169
Stationery and record books, payment for	183
COUNTY TREASURER:	
Liability for paying claim knowing it invalid	106
COURTS OF COUNTY COMMISSIONERS:	
County surveyor, payment of stationery, record books	183
Equitable claim, tractor company advancing tractor	133
Farm Security Administration Program, authority to pay agent	132
Interest bearing warrants against general fund, authority to issue	176
Interest bearing warrants against gasoline fund, authority to issue	176
Janitor for jail, authority to appoint	102
Janitor for courthouse, authority to appoint	102
Payment of expense of tax collector for visiting each voting place	103
Relative within third degree of member, holding office as county treasurer	99
Roads, per diem and mileage of commissioner inspecting payable from gasoline fund	195
Tax Assessor, payment of expenses for visiting each voting place	103
WPA, no authority to pay for transportation of workers to sewing room project	132
COURTS:	
Confession, in criminal case, taken in open court	189
Defendant before inferior court of Talladega County demanding trial by jury	73
Liability of Justice of Peace imposing less than minimum fine	73
CUSTODIAN OF COUNTY FUNDS:	
Bank designated as depository for funds of county treasurer, security ..	127
"D"	
DALLAS COUNTY:	
Jails, authority of county governing body to maintain	47
DEED TAX:	
Federal Revenue stamp not required before filing instrument	100
Retention of title contract	188

INDEX—Continued

	Page
DEMOCRATIC EXECUTIVE COMMITTEE:	
Chairman, running to succeed himself, disqualified from handling absentee ballots	193
DEPOSITORY:	
Bank designated as depository for funds of county treasurer, security	127
DOCTORS AND PHYSICIANS:	
Doctor who has practiced two years in another state, license	58
"E"	
ELECTIONS:	
Alcoholic Beverage Control, liquor referendum, certain expenses	25
Candidate withdrawing and requalifying	150
Chairman Democratic Executive Committee, running to succeed himself, disqualified from handling absentee ballots	193
Constitutional amendment relative to Morgan County, time for holding election	185
Judge of Probate, individual performing duties where judge disqualified, compensation	193
Notices, publication and posting of, payment therefor	69
Precinct, subdivision of	68
Primary, designation of voting places	56
Qualifying fee for Circuit Solicitor	66
Residence, mixed question of law and fact	84
Residential requirements to vote	161
Special district school tax election held only after county-wide school tax in operation, rather than election	109
(See "Voters")	
ESCAPES:	
Homestead, erroneously exempt	36
ETOWAH COUNTY:	
Juvenile Court, sheriff's fees	20
EXCISE TAX:	
Financial institutions	140
EXECUTION:	
Confession in criminal case, taken in open court	189
Minor, costs in suit brought by next friend	90
Non-resident	90
EXEMPTIONS:	
Ad valorem taxes cannot be pro-rated	182
Dam owned by City of Birmingham	105
National Guard, commissary not exempt from payment of alcoholic beverage tax	135
Ox cannot be claimed exempt as cow	103
Right of exemption from payment of debts not determinative of right of exemption from taxation	40

INDEX—Continued

	Page
“F”	
FARM AGENT:	
County Board of Education, authority to pay	132
FARM SECURITY ADMINISTRATION:	
Agent, authority of county to pay	132
FEES:	
Alabama Beverage Control agent, witness	190
Bailiff staying with jury over night	34
Day, no fractional part	34
Garnishment, State Comptroller, where state employee garnisheed	192
Juror excused, per diem and mileage	29
Liquor referendum, certain fees of sheriff	25
Midwife, County Board of Health for issuing permit	117
Mileage of witness, duty of clerk to issue certificate	190
Officers' fees and witness fees, registered against fine and forfeiture fund	35
Repealed act, liability for receiving fees under	167
Sheriff's fees, inquisition of lunacy	181
Sheriff, issuing process from Juvenile Court	20
Sheriff seizing vehicle illegally transporting liquor	136
State Highway Patrol officer, witness	190
Witness fees, when defendant convicted and execution returned “no property found”	54
FILING TAX:	
Deed tax, Federal Revenue Stamp not required before recording	100
Mortgage of municipality given to secure bond issue	145
Retention of title contract	188
FINE AND FORFEITURE FUND:	
Registered witnesses' and officers' fees	35
Witnesses before Grand Jury, claims of, may become claims against	65
Witness fees, when defendant convicted and execution returned “no property found”	54
FINES:	
Highway violation, disposition of fines and forfeitures	38
FRANKLIN COUNTY:	
Law & Equity Court, authority of Judge to bind defendant over to Grand Jury	10
Law & Equity Court, clerk of circuit court, not ex officio clerk of said court	10
FUNDS:	
County sinking fund cannot be invested in Alabama Bridge Bonds	55
Surplus in sinking fund used to construct county office building	74

INDEX—Continued

Page

"G"**GAMING:**

Chances on prizes offered by merchant.....	61
--	----

GARNISHMENT:

State Comptroller, fee, where state employee garnisheed	192
---	-----

GASOLINE FUND:

County, authority to issue warrant against, includes authority to pay interest thereon	60
Interest bearing warrants, authority to issue	176
Per diem and mileage of commissioner inspecting roads	195

"H"**HALE COUNTY:**

Election, designation of places for representatives	56
---	----

HEALTH AND HEALTH DEPARTMENT:

Midwife, fee of County Board of Health for issuing permit	117
(See Public Welfare)	

HENRY COUNTY:

Deputy tax collector may be employed as attorney for county	141
---	-----

HIGHWAYS AND HIGHWAY DEPARTMENT:

Contract bond, substitution of	114
County, equitable claim against, by tractor company advancing tractor	133
Highway patrol, disposition of fines and forfeitures	38
Per diem and mileage of commissioner inspecting roads payable from gasoline fund	195
Property owned by Birmingham Railway Light and Power Company, dedicated to public use	48

HIGHWAY PATROL:

Fine and forfeitures, disposition of each	38
Officer as witness in criminal case	190

HOME DEMONSTRATION AGENT:

County Board of Education, authority to pay	70
---	----

HOMESTEADS:

Adjoining tracts	165
Certificate of credit, failure to file with collector before collector levies execution	96
Certificate of credit issued to deceased	130
Dominant use determines right of exemption	9
Erroneously exempt, method of collecting taxes	36
Homestead exemption must be claimed before tax collector levies execution	96
Property leased prior to October 1	40
Refund, exemption allowed but through error not credited	18

INDEX—Continued

	Page
Right of exemption from payment of debts not determinative of right of exemption from taxation.....	40
Separate tracts, one of which is rented out.....	165
Soldier whose mother lives on his farm.....	53
Tax collector may secure duplicate certificate of credit from tax assessor.....	96
Tax sale, exemption credit allowed.....	154
Time in which to claim exemption.....	27
Time of forfeiture thereof.....	96
Vendee must assess real property in own name to claim exemption.....	50
“I”	
INCOME TAX:	
Agricultural Cooperative Association.....	118
INSANE PERSONS:	
Sheriff's fees, inquisition of lunacy.....	181
INSURANCE:	
County Board of Education, school building.....	29
INTOXICATING LIQUORS:	
Montgomery County, intoxicating liquors, seizure of vehicle illegally used to transport liquor.....	136
“J”	
JAILS:	
County governing body, authority to maintain.....	47
Guard for prisoner confined in hospital, payment of.....	106
JEFFERSON COUNTY:	
Budget, preference of claims.....	88
Judgment, Court of Common Pleas.....	125
Property owned by Birmingham Railway Light and Power Company, dedicated to public use.....	48
JUDGMENTS:	
Confession taken in open court, execution.....	189
Confession taken in open court, approved by judge.....	189
Jefferson County, Court of Common pleas.....	125
Non-resident, execution of.....	90
JUDGES OF PROBATE:	
Candidate for public office withdrawing and requalifying.....	150
Deed tax, Federal Revenue stamp not required before recording.....	100
Election, individual performing duties where judge disqualified, compensation.....	193
JURORS AND JURIES:	
Excused juror per diem and mileage.....	29
Inferior Court of Talladega County, authority when defendant demands trial by jury.....	73

INDEX—Continued

	Page
Witnesses before Grand Jury, claims may become claims against fine and forfeiture fund	65
JUSTICES OF THE PEACE:	
Liability for imposing less than minimum fine	73
JUVENILE COURT:	
Sheriff's fees	20
Suspended sentence, status of defendant after expiration of sentence	190

"L"**LICENSE TAGS:**

Ad Valorem taxes, certificate of tax assessor showing no tax due	105
Ambulances, monthly declining basis	98
Declining basis on private automobile brought into Alabama after November 15	98
Hearse, monthly declining basis	98
Monthly declining basis, ambulances, hearses and taxicabs	98
National Guard, sale of car carrying license tag issued to National Guard	19
Taxicabs, monthly declining basis	98
Trailer operated within city limits	170
Trailers, monthly declining basis	133
Vehicle purchased before tax year but brought into state after, monthly declining basis	77

LICENSES:

Common carrier, authority of municipality to impose where no depot maintained for freight discharged	179
Doctor who has practiced for two years in another state	58
"Engaged in selling" interpreted	112
Fire works	16
Foreign corporation erecting bill posts, interstate commerce	122
Moving picture house	46
Optometrist who sells eye glass frames	78
Planing mills	21
Radio repair shop	184
Rolling store selling tobacco	67
Tobacco, rolling store selling	67
Trailer operated within city limits	170
Trailers, monthly declining basis	139
Typewriter dealer	112
Vehicle purchased before tax year but brought into state after, monthly declining basis	77

"M"**MIDWIVES:**

Permit, fee	117
-------------------	-----

INDEX—Continued

	Page
MILITARY CODE:	
Section 113	135
MILK CONTROL BOARD:	
Court costs	7
MONTGOMERY COUNTY:	
Intoxicating liquors, seizure of vehicle illegally used to transport liquor	136
MORGAN COUNTY:	
Constitutional amendment relative to, time for holding election	185
MORTGAGES AND MORTGAGE TAX:	
Municipality, mortgage to secure bond issue, filing fee	145
Retention of title contract	188
MOTOR VEHICLES:	
Ad valorem taxes, certificate of tax assessor showing no tax due	105
Purchased before tax year but brought into state after, monthly declining basis, license	77
Trailer operated within city limits	170
(See license tags)	
MUNICIPALITIES:	
Common Carrier, authority of municipality to impose license	179
Mortgage given by, to secure bond issue	145
"N"	
NATIONAL GUARD:	
License tag on automobile, sale of car	19
NOTARY PUBLIC:	
Bond, approval by Judge of Probate	50
"O"	
OFFICERS:	
Custodian of county school funds, removal of	194
Deputy Solicitor of Bullock County may receive expenses for services rendered county	51
Deputy tax collector may be employed as attorney for county	141
Elections, qualifying fee of Circuit Solicitor	66
Fees received pursuant to repealed act, liability for	167
Fees when defendant convicted and execution returned "no property found"	54
Incumbent, holds over until beginning of successor's term	152
Liability of Justice of Peace imposing less than minimum fine	73
Relative of County Commissioner, holding office as county treasurer	99
"State Officer" and "County Officer"	71
OPTOMETRY:	
Applicant for second examination before Board of Optometry	115

INDEX—Continued

	Page
"P"	
PENSIONS:	
Confederate Veterans old age assistance and pensions	146
PHARMACISTS:	
Physician owning or operating drug store	152
PRISONS AND PRISONERS:	
Convicts serving sentence pending appeal, case reversed and remanded, cannot claim transportation home	174
Guard for prisoner confined in hospital, payment of	106
"R"	
REDEMPTION:	
Of real property which has been assessed in name of executor of estate when said property has been willed to designated beneficiary	91
Partial payment, former owner may redeem some parcels in full, others on installment plan	119
Property sold for taxes under void assessment	91
REFUNDS:	
Franchise tax of building and loan association, application for	175
Homestead exemption allowed but through error not credited	18
REGISTRATION:	
Residential requirements	161
REVENUE LAWS, 1935:	
Section 2 (j)	103
Section 28	103
Section 30	103
Section 157	103
Section 158	141
Section 166	113, 159
Section 291	119
Section 296	18
Section 345.24	118
Section 346.5	140
Section 347.14	159
Section 348 Schedule 4	112
Schedule 23	122
Schedule 32	67
Schedule 63	16
Schedule 84	21
Schedule 96	46
Schedule 106	58
Schedule 117	184
Schedule 123½	21
Schedule 146	67
Schedule 155	78
Schedule 158.5	77

INDEX—Continued

	Page
Schedule 158.11	139
Schedule 158.12	105
Schedule 158.14	19
Section 350	122
Section 407	113
Section 412	113
Section 5024	141
ROLLING STORES:	
License on selling tobacco	67
RUSSELL COUNTY:	
County Court, costs and fees	22
"S"	
SALES TAX:	
Section 21 (Act 126, Gen. Acts 1936-1937, p. 125)	132
SCHOOLS:	
County Board of Education—may lease school building from town of Louisville	29
Custodian of county school funds, removal by county board	194
Expense allowance of County Superintendent of Education	186
Farm-home demonstration agent, authority of County Board of Education to pay	70
Insurance on buildings	29
Special district school tax election held only after county-wide school tax in operation	109
SCHOOL CODE, 1927:	
Section 132	29
Section 148	152
Section 262	109
SHERIFFS:	
Deputies and other additional help in Tuscaloosa County, authority to employ	172
Fees, seizing vehicle illegally transporting liquor	136
Fees, serving process issued by Juvenile Court	26
Fee, inquisition of lunacy	181
Guns and ammunition may be furnished by county	87
Homestead erroneously exempt, method of collecting taxes	36
Liquor referendum, delivering list of absentee voters	25
Liquor referendum, delivering ballot boxes	25
Liquor referendum, notifying election officers of appointment	25
Montgomery County, intoxicating liquors, seizure of vehicle illegally used to transport liquor	136
SOCIAL SECURITY:	
Chairman of Unemployment Compensation Commission Board requisitions fund from United States Treasury	31
Taxes paid in escrow into circuit court	15
(See Unemployment Compensation Commission)	

INDEX—Continued

	Page
SOLICITORS:	
Deputy solicitor of Bullock County may receive expenses for services rendered county	51
Election, qualifying fee for	66
STATE BOARD OF OPTOMETRY:	
Applicant for second examination	115
SUMTER COUNTY:	
Surplus in sinking fund used to construct county office building	74
SUSPENDED SENTENCE:	
Defendant in Juvenile Court, expiration of sentence	190
"T"	
TALLADEGA COUNTY:	
Inferior Court, authority when defendant demands trial by jury	73
TAXATION:	
Assessment of real property in name of executor of estate when said property has been willed to designated beneficiary	91
Assessment to estate of deceased owner, void	91
Building and Loan Association, franchise tax	175
Business ad valorem taxes	155
Dam owned by City of Birmingham	105
Escrow, taxes paid under Unemployment Compensation Act	15
Estate, interest on	159
Exemption from ad valorem, cannot be pro-rated	182
Excise tax on financial institutions	140
Income tax of Agricultural Cooperative Association	118
Inheritance, interest on	159
Interest on delinquent taxes, rate of, for 1934 and 1935	113
Interest, time when rate changes from 1934 rate to 1935 rate on delinquent taxes	113
Ox cannot be claimed exempt as cow	103
Radio repair shop	184
Redemption of lands, former owner may redeem some parcels in full, others on installment plan	119
Redemption of property sold for taxes under void assessment	91
Refund, homestead exemption allowed but through error not credited ..	18
Sale of real property for delinquent taxes, homestead exemption credit ..	154
Special district school tax election held only after county-wide school tax in operation	109
TAX ASSESSORS:	
"County officer"	71
Motor vehicle, certificate to Judge of Probate showing no tax due	105
Payment of expenses for visiting each voting place	103
TAX COLLECTOR:	
"County officer"	71
Deputy, may be employed as attorney for county	141

INDEX—Continued

	Page
Homestead exemption, collector may secure duplicate from tax assessor.....	96
Payment of expenses incurred for visiting each voting place.....	103
TAX SALE:	
Real property, how homestead exemption credit allowed.....	154
TOBACCO:	
Rolling Store, license	67
TRAILERS:	
License not issued on monthly declining basis.....	139
TRUCKS & TRAILERS:	
License on trailer operated within city limits.....	170
TUSCALOOSA COUNTY:	
Sheriff deputies and other additional help, authority to employ.....	172
"U"	
UNEMPLOYMENT COMPENSATION COMMISSION:	
Administrative director may be chairman of commission.....	79
"Agricultural labor"	59
Benefits payable to worker unemployed before or after January 1, 1938.....	33
Chairman of Commission requisitions funds from U. S. Treasury.....	31
Taxes paid in escrow into circuit court.....	15
Turpentine, persons gathering gum.....	59
"V"	
VETERANS:	
Confederate Veterans, reduction of pension.....	146
Confederate Veterans, old age assistance and pensions.....	146
VOTERS:	
Residence, mixed question of law and fact.....	84
Residential requirements	161
"W"	
WALKER COUNTY:	
County Superintendent of Education, incumbent holds over until beginning of successor's term.....	152
WARRANTS:	
Gasoline tax, authority to issue against, includes authority to pay interest thereon	60
WELFARE:	
Confederate Veterans, old age assistance and pensions.....	146
Taxes paid in escrow into circuit court.....	15
(See Health Department)	

INDEX—Continued

Page

WITNESSES:

Fees, when defendant convicted and execution returned "no property found"	54
Grand Jury, claims of witnesses may become claims against fine and forfeiture fund	65
Mileage, duty of clerk to issue certificate	190
Registered claims of, payable from fine & forfeiture fund	35

WITNESS FEES:

Alcoholic Beverage Control Agent, to whom payable	190
State Highway Patrol officer, to whom payable	190

WORDS AND PHRASES:

"Capital Employed"	155
"County Officer"	71
"Day" no fractional part	34
"Engaged in Selling"	112
"Next general election"	161
"Office of Profit"	79
"Ox" and "Cow"	103
"Per annum"	186
"State Officer"	71
"Traller"	170

WORKS PROGRESS ADMINISTRATION:

County Board of Education not authorized to pay contractor amount deducted by WPA for breach of contract	168
County not authorized to pay for transportation of workers to sewing room project	132

